Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Chronological List of Relevant Docket Entries

1969

Jan. 22 Filed indictment

Mar. 17 Defendant pleads not guilty

Oct. 16 Defendant found guilty after trial by jury

Nov. 19 Defendant sentenced under Federal Youth Correction Act pursuant to 18 U.S.C. §§5010(b) and 5017(c)

Nov. 19 Filed notice of appeal

1970

Dec. 8 Received from Court of Appeals copy of judgment of Court of Appeals [entered November 9, 1970] [*Davis I*] remanding to District Court for further proceedings in accordance with Court of Appeals opinion

1971

Feb. 2 Remand hearing conducted before District Court and Court makes oral findings of fact and conclusions of law, and denies motion of defendant for judgment of acquittal on remand

Mar. 16 District Court enters findings of fact and conclusions of law and order affirming judgment of conviction heretofore entered, and directs that findings of fact, conclusions of law and order be transmitted to Court of Appeals for Ninth Circuit

1971

Aug. 16 Received from Court of Appeals copy of judgment of Court of Appeals [entered August 12, 1971] [*Davis II*] affirming judgment of District Court

Sept. 13 [This item does not appear in clerk's docket entries.] Court of Appeals entered order denying petition for rehearing and rejecting suggestion for rehearing *en banc*

Oct. 5 Order entered by District Court remanding defendant to custody and commitment pursuant to prior judgment and commitment

Dec. 1 Filed order by Mr. Justice Douglas, as Circuit Justice of Ninth Circuit, setting bail pending *certiorari* at $20,500, and certain other conditions

1972

Jan. 12 Filed order of Mr. Justice Douglas modifying amount of bond pending *certiorari* from $20,500 to $10,000, other conditions on bond to remain the same

May 31 Received from Court of Appeals copy of Supreme Court order [entered February 22, 1972] denying petition for writ of *certiorari* and copy of order of Court of Appeals denying petition for rehearing

June 5 Filed order from Court of Appeals [entered May 22, 1972] denying motion for extension of time in which to file out of time petition for rehearing with suggestion for rehearing *en banc* and tendering petition for rehearing *en banc*

1972

June 5 Mandates and judgment of Supreme Court and Court of Appeals filed and spread on record; defendant's motions pursuant to 28 U.S.C. §2255 and for reduction of sentence under Rule 35 filed and denied; defendant ordered committed to custody

July 10 Hearing on renewed motion for reduction of sentence pursuant to Rule 35; motion granted in part and modified judgment filed

1973

Jan. 18 Received from Court of Appeals copy of judgment of Court of Appeals [entered December 26, 1972] [*Davis III*] affirming judgment of District Court denying motion pursuant to 28 U.S.C. §2255

Nov. 13 Received from Supreme Court copy of order of Supreme Court [entered November 5, 1973] granting petition for *certiorari*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 26415

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

v.

JOSEPH ANTHONY DAVIS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA; A. ANDREW HAUK, JUDGE

(November 9, 1970)

First Court of Appeals Opinion, 432 F.2d 1009 (Davis I)

Included in Petition for Certiorari at 1a.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 3207-AAH-CD

On Appeal: No. 26415

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

JOSEPH ANTHONY DAVIS,

Defendant.

(February 2, 1971)

Extract From Testimony Before District Court on Remand Hearing by Local Board Secretary, Miss Ruth P. Krisinger, pages 49-51

[49] *By Mr. Kallen*:

Q. Has it been your experience in the past that a man who has not had a pre-induction physical could be inducted? Speaking of 1967. A. State that again, sir.

Q. If a man did not have a pre-induction physical examination, could he be inducted? A. As a delinquent?

The Court: Or as a volunteer.

The Witness: As a volunteer. Volunteer waives all rights of appeal periods, of physical, they are

ordered for physical—ordered for induction without a physical. They are given a physical the day they report for induction.

Q. Mr. Davis was not a volunteer; was he? A. Not at any time.

Q. So aside from him being categorized as delinquent, is it your experience he would have been inducted without his pre-induction physical if he were not classified as a delinquent? A. A delinquent when they are ordered they are given a physical the date they report for induction.

Q. I understand that. What I am asking is had Mr. Davis not been declared a delinquent would he have been inducted without his pre-induction physical? [50] A. Well, no.

The Court: They get the physical before they are inducted?

The Witness: If he had reported for his physical and been determined acceptable, therefore then he would have been on the regular order of call.

The Court: I think what you mean is ordered for induction. That's a different thing from induction.

By Mr. Kallen:

Q. I am sorry, let me rephrase.

Had Mr. Davis not been declared a delinquent, would he have been ordered for induction without his pre-induction physical? A. No, he would not. His acceptability has to be determined to know whether to order him for induction.

Q. In your experience in 1967 a man who did not receive a DD62 Form statement of acceptability would be inducted unless he were delinquent? Would a man who has not received a DD62 Form be inducted— A. There are many factors the way you are stating that. We mail the DD62. If he didn't receive it it wasn't returned to the Local Board—I mean, there are many things that could cover that. I wouldn't flatly say yes or no.

Q. Let me clarify that. If a DD62 had not [51] been sent to a man, would he be ordered for induction if he were not a delinquent? A. What reason would there be for not mailing the DD62?

Q. One possible reason is that he might not take the physical. A. There wouldn't be a DD62 issued. They are issued by the Armed Forces Examining and Induction Station and they are returned to the Local Board. So if he did not report for induction they could not issue a DD62.

Q. Is it your experience that if a DD62 was not issued a man would be ordered for induction unless he were a delinquent? A. No, he couldn't be—he would be declared delinquent.

Q. Absent any declaration of delinquency he would not be inducted unless a DD62 had been issued; is that correct?

The Court: Unless he is a volunteer.

Mr. Kallen: I am sorry.

Q. Unless a man were a volunteer and unless a man had been issued or the Armed Forces Examining Station had issued a DD62 Form, would a man be inducted other than a delinquent? A. Other than a delinquent, no.

• • • • •

Oral Findings of District Court After Remand Hearing February 2, 1971

[Caption Omitted in Printing]

Included in Petition for Certiorari at 2a-6a.

District Court's Findings of Fact and Conclusions of Law After Remand

March 16, 1971

[Caption Omitted in Printing]

Included in Petition for Certiorari at 7a-10a.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Caption Omitted in Printing]

August 12, 1971

Second Court of Appeals Opinion, 447 F.2d 1376 (Davis II)

Included in Petition for Certiorari at 11a.

Order of Court of Appeals Denying Rehearing September 13, 1971

[Caption Omitted in Printing]

Included in Petition for Certiorari at 12a.

SUPREME COURT OF THE UNITED STATES

No. 71-661

[Caption Omitted in Printing]

February 22, 1972

Order Denying Certiorari

Included in Petition for Certiorari at 13a.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Caption Omitted in Printing]

May 22, 1972

Order Denying Out of Time Petition for Rehearing *En Banc*

Included in Petition for Certiorari at 14a.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Honorable A. Andrew Hauk, Judge Presiding

Case No. 3207—Criminal

[Caption Omitted in Printing]

June 5, 1972

Reporter's Transcript of Proceedings Denying Petitioner's Motion Under 28 U.S.C. §2255

Included in Petition for Certiorari at 15a-17a.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 72—2438

[Caption Omitted in Printing]

December 26, 1972

Third Court of Appeals Opinion, 472 F.2d 596 (Davis III)

Included in Petition for Certiorari at 18a-19a.

Material From Defendant's Selective Service File Admitted as Part of Exhibit 1 in Original Trial in District Court

Selective Service File—Minutes of Action

(Registrant Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	Var. Ver. No.
FEB 3 1965	1A	1A
FEB 3 1965	Form 110 Mailed	
FEB 16 1965	SSS Form 223 mailed for physical on MAR 4 1965	
3-25-65	SSS Form 225 dtd 3-17-65 shows failed to report for Pre-	
JUL 29 1965	SSS FORM 127 MAILED	
SEP 19 1965	SSS Form 223 mailed for physical on OCT 8 1965	
10/22/65	Papers returned - failed to report for physical	
12/6/65	Mailed Cal Form 301	
2 1966	SSS form 127 Mailed	
1966	N. A. Smith	
5/4/66	SSS Form 888 sld to reg. cc to SSO	
FEB 21 1967	SSS Form 252 mailed for Induction on MAR 7 1967 PAPERS RET - FL/PSH	
MAR 17 1967	File sent to SSO	
Apr 4, 1967	File returned from SSO.	
APR 10 1967	SSS Form 252 mailed for Induction on From JUL 11 1967 as dd	
6-3-67	SSS Form 150 issued to registrant	
JUN 15 1967	File sent to SSO —10-25-67 File ret'd from SSO.	
11-6-67	SSS FORM 301 sld to US ATTORNEY, CC SSO	
11/22/67	File forwarded to Southern Area Hqs. for prosecutive study	
	Lacy Sutherland (Davis) 936-0432	

(Continue on Page 7)

Selective Service File—Delinquency Warning

Approved By The Director
of Selective Service

Mailed April 6, 1966
to
3281 Main
Los Angeles, Calif.

SELECTIVE SERVICE SYSTEM
STATE OF CALIFORNIA
DELINQUENCY WARNING

Local Board No. 101
Los Angeles County
1301 Eastwood Blvd.
Los Angeles Calif 90.24
(Local Board Stamp)

December 6, 1965
(Date of Mailing)

Selective Service No.			
4	301	46	826

To Joseph (First) Anthony (Middle) DAVIS (Last)

Address P.O.Box 46-243
(Street and Number or RFD Route)

Los Angeles (City, Town, or Village) (County) Calif. (State) 90046 (Zip Code)

1. You are hereby notified that this Local Board is considering declaring you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Failed to report for Armed Services physical examination on October 8, 1965.

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, and such failure may result in your being declared delinquent. A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants.

4. This Local Board may excuse your delinquency status if it finds that the reason for noncompliance was not willful and you comply. In any event, this document becomes part of your permanent Selective Service file and should such delinquency be excused any further noncompliance on your part could result in your immediate induction.

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Emilie W. Chapman
(Member or Clerk of Local Board)
Emilie W. Chapman, Clerk

(SSS Form 304)

Selective Service File—Delinquency Notice

SELECTIVE SERVICE SYSTEM

DELINQUENCY NOTICE

May 4, 1966
(Date Became Delinquent)

May 4, 1966
(Date of Mailing)

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE NO.			
4	101	46	828

To Joseph (First) Anthony (Middle) Davis (Last)

Address 3781½ Manlo
(Street and Number or RFD Route)

Los Angeles (City, Town, or Village) L.A. (County) California (State)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Failed to report for Armed Forces Physical Examination Oct. 8, 1965.
Failed to keep Local Board informed of current address.

2. You are hereby directed to report to this local board immediately, either in person or by mail.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment.

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W. X. [illegible] (Member or Clerk of Local Board)

(See Instructions on Reverse Side)

Selective Service File—1st Order to Report for Induction

Approval Not Required.

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

SELECTIVE SERVICE
RECEIVED
LOCAL BOARD GROUP "C"
FEB 23 1967

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Number)

The President of the United States,

To

Joseph Anthony Davis
3781½ Petlo Avenue
Los Angeles, California 90007

1301 WESTWOOD BLVD
LOS ANGELES, CALIF. 90024

February 21, 1967
(Date of mailing)

SELECTIVE SERVICE NO.			
4	101	46	928

L-A

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report
L.A. EXAMINING AND INDUCTION STATION
1033 S. Broadway, Los Angeles, Calif.
(Place of reporting)

on MAR 7 1967 (Date) at 7:30 A.M. (Hour)

for forwarding to an Armed Forces Induction Station.

E. M. Bishop
(Member or clerk of local Board)
E.M. Bishop

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

The Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your employment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order

(Revised 4-30-52) (Previous printings may be used until exhausted.)

Selective Service File—2nd Order to Report for Induction

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

DELINQUENT

Local Board No. 101
Los Angeles County
1701 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Address)

June 20, 1967
(Date of mailing)

SELECTIVE SERVICE NO.			
4	101	46	828

The President of the United States,

To

Joseph Anthony Davis
868 Carroll Avenue
St. Paul, Minnesota

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report
to L.A. Examining and Entrance Station
1033 S. Broadway, Los Angeles, Calif.
(Place of reporting),

on July 11, 1967 (Date) at 7:30 A. M. (Hour)

for forwarding to an Armed Forces Induction Station.

W. H. Bishop (Member or Clerk of Local Board)

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE AN PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters. I
e to take the following with you when reporting to the induction station. The documents will be returned to you. (a)
FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of
certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the
nature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified
order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than this
ant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for
port, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affida
establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any substantial hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

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If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order

SSS Form 252 (Revised 6-30-67) (Previous printings may be used until exhausted.)

Exhibit 2 in Remand Hearing
Local Board No. 101

November 1966 Delivery Lists

Local Board No. 101
Los Angeles County
1391 Westwood Blvd.
Los Angeles, Calif. 90024
(Address: Number, Street)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

Sheet No. 1 of 2 sheets

November 15, 1966
(Date of delivery)

Call No. 197

Induction period November, 1966
(Month)

To: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on Nov. 15, 1966 (Date) by Private carrier (Name of carrier) to report to you for induction.

Number called for	21	Number listed on transfer in	18
Number listed from this board	21	Total number forwarded	

(1) SELECTIVE SERVICE NO.				(2) NAME (Last)	(First)	(Middle Initial)	(3) Not Previously Found Qualified	(4) DISPOSITION: Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Other	(5) REMARKS
1	4	101	48	113	WAYNE,	Michael	D.	X							
2	4	101	47	1100	HALLIDE,	Harry	L.						X		
3	4	101	42	583	KIESAN,	William	H.						X		Ent
4	4	101	43	238	REEGOLTZ,	Ronald	X.	X							
5	4	101	43	406	KIROSZ,	Gary	S.	X							
6	4	101	44	102	GORDON,	Hillard	W.						X		Cancelled
7	4	101	44	281	POLLARD, JR.	Julius	-						X		Postponed Dec.
8	4	101	44	334	WEBB,	James	J.						X		Postponement
9	4	101	44	836	HOKEL,	Jeffrey	A.	X							Postponement received
10	4	101	44	870	TAK,	Kay	Y.	X							
11	4	101	45	111	FIKE,	Stuart	A.	X							
12	4	101	45	305	JACOBS,	Joseph	-						X		PHYSICAL REJECT
13	4	101	45	496	ICHIKOTSUBO,	Howard	T.	X							
14	4	101	45	811	WALKER,	Charles	Z.								Postponed
15	4	101	46	116	WIRD,	Ronald	J.								PENDING CIVIL OFFENSE

Totals (Enter on last sheet only)

Emily W. Chapman
(Signature of clerk or member of local board)

Oct. 28, 1966
(Date of preparation)

(Signature of C. O. AFIS)

(Grade and organization)

23 NOV 1966
(Date of return to local board)

Local Board No. 101

November 1966 Delivery Lists—*Continued*

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024

SELECTIVE SERVICE SYSTEM
DELIVERY LIST

Sheet No. 2 of 2 sheets

November 15, 1966

4	101	46	299	WILLIAMS,	Gregory	B.										X		Cancelled
4	101	46	289	[illegible]	John	H.									X			
4	101	46	516	JENKINS,	Willie	Lee												Postponed
4	101	46	738	[illegible]	Richard	I.												Cancelled
4	101	46	788	[illegible]	General	A.									X			
4	101	46	895	[illegible]	Leonard	—										X		[illegible]

Totals (Enter on last sheet only)

Emilie V. Chapman
Emilie V. Chapman
Oct. 28, 1966

23 NOV 1966

Exhibit 3 in Remand Hearing
Local Board No. 101
March 1967 Delivery Lists

Local Board No. 101
Los Angeles County
[illegible] Kenwood Blvd.
[illegible], Calif. 90024

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

Sheet No. 1 of 1 sheets

March 7, 1967
(Date of delivery)

Call No. Supplemental 201

Induction period March
(Month)

To: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on March 7, 1967 (Date) by Private Carrier (Name of carrier) to report to you for induction.

Number called for		Number listed on transfer in	
Number listed from this board	4	Total number forwarded	4

(a)	(b) SELECTIVE SERVICE NO.				(c) ORDERED FOR IMMEDIATE INDUCTION AS DELINQUENTS REGISTRANTS NAME (Last) (First) (Middle Initial)		(d) Not Processed (Reason Required)	(e) DISPOSITION: Inductions: Army	Navy	Air Force	Marine Corps	Transferred	Failed To Report	Held Over	(f) REMARKS
1	4	101	46	828	DAVIS,	Joseph	A.						X		ret to class
2	4	101	47	295	APPELBAUM,	Micky	J.					X			PHYSICAL REEX. 7-V
3	4	101	47	454	TAVARES,	Donald	G.						X		ret to class
4	4	101	47	615	WHITTAKER,	Craig	S.								Walkout
5															
6															
7															
8															
9															
10															
11															
12															
13															
14															
15															

RECEIVED
LOCAL BOARD GROUP "C"
MAR 14 1967
1301 WILSHIRE BLVD.
LOS ANGELES, CALIF. 90024

Totals (Enter on last sheet only)

[signature] Chairman
(Signature of clerk or member of local board)
February 21, 1967
(Date of preparation)

J. JAMES [illegible] U. S. AFSS
1 LT. USAF

13 MAR 1967
(Date of return to local board)

Local Board No. 101

March 1967 Delivery Lists—*Continued*

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024

(Local Board Stamp)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

Sheet No. 1 of 2 sheets

March 7 1967
(Date of delivery)

Call No. 201

Induction period March 1967
(Month)

TO: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on March 7 1967 (Date) by Private Carrier (Name of carrier) to report to you for induction.

Number called for 30	Number listed on transfer in .....
Number listed from this board 31	Total number forwarded 18

	(1) SELECTIVE SERVICE NO.				(2) NAME (Last) (First) (Middle Initial)		(3) Host Performed Peace Quadrant	(4) DISPOSITION: Inducted Army	Air Force	Marine Corps	Postponed Until (Date)	Failed To Report	Held Over	(5) REMARKS
V_1	4	101	47	862	MC ELROY, Tyrone	K.		X						
V_2	4	101	47	927	JIMERSON, Michael	J.		X						
3	4	101	43	681	FINESTONE, William	B.								Postponed
4	4	101	43	881	CLARK, Frederick	S.		X						
5	4	101	43	929	MYRIE, Hersan	O.								Postponed
6	4	101	44	54	NEDHAM, John	A.		X						
7	4	101	44	382	KAPLAN, Harvey	R.						X		am'd 3-9 Postponed left th. prty
8	4	101	44	503	LIBKIND, Peter	O.		X						
9	4	101	44	588	KAWAMOTO, Toshiyuki	-								Postponed
10	4	101	44	719	DICKENS, Barry	J.								POSTPONED
11	4	101	45	210	HOLMES, Von	E.						X		
12	4	101	45	270	SILBERT, Stanley	M.								Postponed
13	4	101	45	306	CASTANEDA, JR. Anthony	-								Postponed
14	4	101	45	495	ROBBINS, Gary	J.		X						
15	4	101	45	830	DAVIS, Ronald	C.								Postponed

Totals (Enter on last sheet only)

RECEIVED
LOCAL BOARD NO. 101

Emilie W. Chapman
(Emilie W. Chapman, Clerk or member of local board)

February 21 1967
(Date of preparation)

MAR 14 1967

C. JAMES
(Signature of C.O. AFEES)

1301 Westwood Blvd. Los Angeles, Calif. 90024
(Grade and organization)

13 March 1967
(Date of return to local board)

SSS Form No. 261 (Revised 2-10-53)
(Printing of 6-12-52 may be used)

Local Board No. 101

March 1967 Delivery Lists—*Continued*

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024

SELECTIVE SERVICE SYSTEM
DELIVERY LIST
CONTINUATION SHEET
(Prepare in Quintuplicate)

Sheet No. 2 of 2 sheets

March 7 1967
(Date of Delivery)

(1) SELECTIVE SERVICE NO.				(2) NAME (Last) (First) (Middle Initial)		(3) Not Previously Process Qualified	(4) DISPOSITION Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
4	101	45	868	SHAW, Artie L.			X							
4	101	45	868	SEAWELL, Joseph W.			X							
4	101	46	39	BRUCKER, Earl W.										POSTPONED 1-A(O)
4	101	46	56	ROSE, Steven R.										POSTPONED Prev. Postponed
4	101	46	313	WASHINGTON, Ronald E.										Postponed
4	101	46	316	FREIMUTH, John S.										Postponed
4	101	46	355	OWENS, Rodney B.										POSTPONED
4	101	46	360	FORT, Weldon J.									X	[illegible]
4	101	46	495	ROTH, John L.								X		PHYSICAL REJECT 4X – [illegible]
4	101	46	600	PARENTO, David E.										Postponed
4	101	46	523	KATSUNO, Bruce										Postponed
4	101	46	526	NAKAYA, Raymond K.			X							
4	101	46	715	BEVERLY, Daniel W.			X							
4	101	46	903	WEBSTER, Leon										Postponed
4	101	46	913	GREENE, JR., Milton L.									X	[illegible]
4	101	46	1028	WAGNER, Jack										POSTPONED [illegible]

Totals (Enter on last sheet only)

RECEIVED
LOCAL BOARD
MAR 14 1967

Phillip McClapmen
(Signature of person making delivery or member of local board)

February 21 1967
(Date of preparation)

1301 Westwood Blvd.
Los Angeles, Calif. 90024

J. JANES
(Signature of person receiving)
LT. USN
(Title)

13 MAR 1967
(Date of return to local board)

Exhibit 4 in Remand Hearing
Local Board No. 101

July 1967 Delivery Lists

Local Board No 101
Los Angeles County
1301 Westwood Blvd
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

DELINQUENTS

Sheet No. 1 of 1 Sheets

July 11, 1967
(Date of delivery)

Call No. 205

Induction period July 1967
(Month)

TO: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on 7-11-67 (Date) by Private Carrier (Means of carrier) to report to you for induction.

Number called for	
Number listed from this board	3
Number listed on transfer in	
Total number forwarded	3

	(1) SELECTIVE SERVICE NO.				(2) NAME (Last)	(First)	(Middle Name)	(3) Has Previously Passed Qualifying	(4) DISPOSITION: Induction: Army	Navy	Air Force	Marine Corps	Postponement Requested	Failure To Report	Other	(5) REMARKS
1	4	101	46	828	DAVIS,	JOSEPH	A.	X						X		
2	4	101	47	248	ROSS,	RICHARD	A.							X		PHYSICAL REJECT
3	4	101	47	771	ESPOSITO,	ELIAS	-	X						X		
4																
5																
6																
7																
8																
9																
10																
11																
12																
13																
14																
15																

RECEIVED
LOCAL BOARD GROUP No. 4
JUL 20 1967
1301 Westwood Blvd
Los Angeles, Calif. 90024

Totals (Enter on last sheet only)

Emilie W. Chapman
(Signature of clerk [illegible] local board)
Emilie W. Chapman
June 20, 1967
(Date of preparation)

LELAND [illegible]
(Grade and organization)
2LT, ACC
19 JUL 1967
(Date of return to local board)

Local Board No. 101

July 1967 Delivery Lists—*Continued*

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Number)

SELECTIVE SERVICE SYSTEM

DELIVERY LIST

(Prepare in Quintuplicate)

Sheet No. 1 of 3 sheets (Appended list required.)

July 11, 1967
(Date of delivery)

Call No. 205

Induction period _____ (Month)

TO: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on 7-11-67 (Date) by Private Carrier (Means of carrier) to report to you for induction.

Number called for	46	Number listed on transfer in	
Number listed from this board	46	Total number forwarded	38

(1) SELECTIVE SERVICE NO.				(2) NAME (Last)	(First)	(Middle Name)	(3) Not Previously Form Qualified	(4) DISPOSITION Induction: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
1	4	101	44	542	SOBOL,	BRUCE	I. ✓	X							
2	4	101	45	226	BARBER, JR.	LEO	- ✓						X		Enl.
3	4	101	46	520	MARTINEZ, JR.	THOMAS	-	X							
4	4	101	42	247	ITO,	TAKESHI	R. ✓	X							
5	4	101	42	577	MITTELBACH,	GARY	C.					X			PHYSICAL REJECT 7/67 Prev. Postponed
6	4	101	42	608	LEE,	WILLIAM	J.					X			PHYSICAL REJECT 7/67
7	4	101	42	705	SCOTT,	ROBERT	D.					X			PHYSICAL REJECT Prev. Postponed
8	4	101	43	51	BARNWELL,	JOHN	C.								Postponed
9	4	101	43	412	CHALFIN,	MAX	L.								Cancelled
10	4	101	43	567	STANDARD,	ROBERT	RECEIVED LOCAL BOARD C.O. JUL 20 1967								Postponed
11	4	101	45	218	DURHAM,	MICHAEL	JUL 20 1967								Cancelled
12	4	101	45	453	MERCHASIN,	PAUL	1301 Westwood Boulevard Los Angeles, Calif. 90024								Postponed
13	4	101	45	538	KAUFAN,	MICHAEL	A.								Postponed
14	4	101	45	735	WERTKIN,	STUART	S. ✓	X							
15	4	101	46	743	KOSBERG,	MICHAEL	I.								Postponed
					Totals (Enter on last sheet only)										

Emilie W. Chapman
Ila W. Chapman (Signature of clerk or member of local board)

June 23, 1967
(Date of preparation)

LELAND I. PLEDGER
(Signature of C. O. AFSS)
2LT, AGC
(Grade and organization)

19 JUL 1967
(Date of return to local board)

Form No. 201 (Revised 2-15-67) May be used

Local Board No. 101

July 1967 Delivery Lists—*Continued*

Local Board No 101
Los Angeles County
1301 Westwood Blvd
Los Angeles, Calif. 90024

SELECTIVE SERVICE SYSTEM
DELIVERY LIST
CONFIRMATION SHEET
(Prepare in Quintuplicate)

Sheet No. 2 of 3 sheets
July 11, 1967

(1) SELECTIVE SERVICE NO.				(2) NAME (Last)	(First)	(Middle Initial)	(3) Not Previously Found Qualified	(4) DISPOSITION Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
4	101	45	759	JONES,	ALLEN	O.	✓								Cancelled
4	101	46	199	HELTOND,	WAYNE	E.	✓	X							
4	101	46	242	SHAW,	DAVID	E.	✓	X							
4	101	46	863	HICE,	HARVEY	J.	/								Cancelled
4	101	47	105	BOWE,	RONALD	L.	✓								Cancelled
4	101	47	122	YOUNGMAN,	HARVEY	-	✓						X		Enl
4	101	47	125	KIZRAHI,	DAVID	-	✓	AR PENDING CIVIL OFFENSE CHARGE ACTION							
4	101	47	128	ASATO,	KENNETH	F.	✓	X							
4	101	47	173	PENA,	JOSE	-	✓	X					X		
4	101	47	261	WALKER, JR.	ELMER	W.							X		
4	101	47	299	YASUDA,	KOSETS	S.	✓	X							
4	101	47	328	HARDIN,	ROGER	K.	✓						X		Enl
4	101	47	338	NUNES,	GREGORY	C.	✓								Postponed
4	101	47	350	McFRAZIER,	JOSEPH	R.	✓						X		Enl
4	101	47	379	CROWLEY,	OLLIE	C.	✓						X		Enl
4	101	47	424	PALMER,	DAVID		✓								Postponed
4	101	47	467	KIDD,	RONALD	E.	✓	X							
4	101	47	486	FUTAMI,	GEORGE	H.	✓	X							

LOCAL BOARD GROUP NO. JUL 20 1967 1301 Westwood Blvd Los Angeles, Calif. 90024

Totals (Enter on last sheet only)

Emilie V. Chapman
Signature of member of local board
June 23, 1967
(Date of transmittal)

LELAND I. PFEDGER, Lt. AGC
Signature of U.S. Armed Forces member
19 JUL 1967
(Date of return to local board)

Local Board No. 101

July 1967 Delivery Lists—*Continued*

Local Board No 101
Los Angeles County
1200 Westwood Blvd
Los Angeles, Calif 90024
(Area, Route, Route)

SELECTIVE SERVICE SYSTEM
DELIVERY LIST
CONTINUATION SHEET
(Prepare in Quintuplicate)

Sheet No. 3 of 3 sheets
July 11, 1967
(Date of Delivery)

Approved
(OMB Approval)

(1) SELECTIVE SERVICE NO.	(2) NAME (Last) (First) (Middle Initial)	(3) Has Previously Been Qualified	(4) DISPOSITION Inducted: Army	Navy	Air Force	Marine Corps	Found Not Qualified	Failed To Report	Held Over	(5) REMARKS
4 101 47 516	ECHEVERRIA, HERMAN R.	✓						X		
4 101 47 539	JOHNSON, OTIS L.	✓	X							
4 101 47 547	VEGA, ROBERT -	✓	X							
4 101 47 562	WATSUDA, MASAMI R.	✓	X							
4 101 47 574	WYCOFF, STEVEN G.	✓	X AG PENDING CIVIL OFFENSE X WAIVER ACTION							Rec
4 101 47 588	CHASE, JAMES D.	✓						X		Earl
4 101 47 589	NELSON, ALLEN J.	✓								Cancelled
4 101 47 602	HADDOCK, ERNEST E.	✓						X		PHYSICAL REJECT 19 JUL 67
4 101 47 607	GIMPEL, STEPHEN P.	✓						X		Gd
4 101 47 614	SCHMARTZ, HOWARD L.	✓								Postponed
4 101 47 629	CHRISTOPHER, JR. ODELL -	✓	X							
4 101 47 630	FALKNER, MICHAEL A.	✓	X							
4 101 47 643	HARDING, JERRY'S L.	✓	X							

RECEIVED
LOCAL BOARD NO. 101
JUL 20 1967
1200 Westwood Blvd
Los Angeles, Calif. 90024

Totals (Enter on last sheet only)

Dallie W. Chapman
(Signature of clerk or member of local board) Dallie W. Chapman

June 23, 1967
(Date of transmittal)

LELAND J. GREGET, O. AF281
2LT. AGC
(Grade and organization)

15 JUL 1967
(Date of return to local board)

Supreme Court of the United States

No. 72-1454

Joseph Anthony Davis,

Petitioner

v.

United States

ORDER ALLOWING CERTIORARI. Filed November 5 ----------, 19 73.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted.

APR 25 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 26, 1972.

Opinions Below

The first opinion of the Court of Appeals is reported at 432 F.2d 1009 and is set out in the Appendix, *infra*, at p. 1a. The oral findings of the district court following the hearing on remand are set out in the Appendix, *infra*, at pp. 2a-6a. The district court's findings of fact and conclusions of law following that hearing on remand are unreported and are set out at pp. 7a-10a, in the Appendix, *infra*. The second Court of Appeals opinion affirming petitioner's conviction is reported at 447 F.2d 1376 and is

set out in the Appendix, *infra*, at p. 11a. The order denying rehearing is unreported and is set out at p. 12a of the Appendix, *infra*. The order of this Court denying certiorari is reported at 405 U.S. 933 and is set out in the Appendix *infra* at p. 13a. The order of the Court of Appeals denying petitioner's motion for leave to file an out of time petition for rehearing with a suggestion for rehearing *en banc* is unreported and is set forth *infra* in the Appendix at p. 14a. The findings of the district court denying petitioner's motion pursuant to 28 U.S.C. §2255 is unreported and is set out in the Appendix *infra* at pp. 15a-17a. The judgment of the Court of Appeals, here sought to be reviewed, affirming the district court's denial of relief under 28 U.S.C. §2255 is reported at 472 F.2d 596 and is set out *infra* in the Appendix at pp. 18a-19a.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming the denial of relief under 28 U.S.C. §2255 was entered on December 26, 1972. On March 21, 1973, Mr. Justice Douglas signed an order extending the time to file this petition up to and including April 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Court of Appeals erred in holding that a change in the law which occurred after appellate affirmance of a conviction could not be considered in a proceeding brought under 28 U.S.C. §2255.

2. Whether the decision below is in conflict with prior decisions of the Court of Appeals, and whether such court's persistent refusal to resolve the intra-circuit conflict compels action by this Court.

3. Whether the decision below is inconsistent with the decision of this Court in *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

4. Whether the decision below is in conflict with prior decisions of the Court of Appeals of the Fifth and Fourth Circuits.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the Fifth Amendment to the Constitution of the United States; Chapter 153 of Title 28, United States Code (28 U.S.C. §2255); the Military Selective Service Act of 1967 (50 U.S.C. App. §451 *et seq.*) 32 C.F.R. 1602.4 (1967); 32 C.F.R. Part 1642 (1967); 32 C.F.R. 1631.7 (1967); and 1631.7 (1970).

Statement of the Case

Petitioner registered with Selective Service Local Board No. 101, Los Angeles, California, on October 4, 1963 (8a).[1] On February 3, 1965, he was classified I-A. On February 16, 1965, he was ordered to report for an Armed Forces physical examination on March 4, 1965 (20a). On the appointed day, petitioner failed to report but subsequently

[1] "a" references refer to the appendix to this petition.

contacted the local board and explained that his failure to report was due to illness (SSF 28).[2] On September 19, 1965, petitioner was ordered to report for a pre-induction physical examination on October 8, 1965 (20a, SSF 30). The order was mailed to a post office box address in Los Angeles supplied to the local board by petitioner. On September 22, 1965, the order was returned to the local board, stamped, "Addressee Unknown" (SSF 31). Petitioner did not report for his pre-induction physical on October 8, 1965. Subsequently, on December 6, 1965, petitioner was mailed a California Selective Service Form 304, "Delinquency Warning" (21a, SSF 32), which notified petitioner that his local board was "considering declaring you to be delinquent..." and further that,

> "A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants . . . any further noncompliance on your part could result in your immediate induction" (21a, SSF 32).

This notice was mailed to the same Los Angeles post office box as the previous physical examination orders had been mailed to. In addition, the "Delinquency Warning" was mailed to another Los Angeles address, "3781¼, Menlo." The "warnings" were received back at the local board on December 15, 1965, and April 14, 1966, respectively, stamped, "Unknown" (SSF 33-35). Thereafter, on May 4, 1966, petitioner's local board declared him to be a delinquent pursuant to 32 C.F.R. Part 1642, et seq.,

---

[2] "SSF" references refer to petitioner's paginated Selective Service File, Government's Exhibit 1 in the trial court.

and mailed him a Delinquency Notice, SSS Form 304 (22a) at the "Menlo" address. On the same day, petitioner appeared at the local board and completed a Current Information Questionnaire, again giving the "Menlo" address as his current mailing address (SSF 41). Thereafter, on February 21, 1967, petitioner was ordered to report for induction (23a). On the face of the induction order was typed the word "Delinquent" (23a). Mailed to the "Menlo" address, the order was returned to the local board undelivered on February 23, 1967 (SSF 44).

On the day set for his induction, March 7, 1967, petitioner did not report (20a). His selective service file was subsequently forwarded to the California State Headquarters of Selective Service for review. It was then returned to the local board with instructions from the State Director to reorder petitioner for induction by mailing such an order to a third address in St. Paul, Minnesota, previously supplied to the local board by petitioner (SSF 46). On June 20, 1967, an order to report for induction on July 11, 1967 was mailed to petitioner at his Minnesota address. As did the previous induction order, the order of June 20th had the word "Delinquent" typed on the face (24a). The Minutes of Action (20a), also reflect that petitioner was ordered "as Del [*sic*]." On July 11, 1967, petitioner failed to report for induction.

Proceedings Below

Petitioner was originally tried to a jury and convicted of having failed to report for induction on the July 11, 1967, date. On appeal, the Ninth Circuit remanded without limitation of scope but especially for consideration of the case

in light of . . . Gutknecht v. United States . . ." 432 F.2d at 1010 (1a). On remand the district court, Hauk, D.J., found:

"... 21 others were younger than [petitioner and] were called up either before or at the same time he was on the order of call, and to me that means that there was no acceleration. Now, turning to the second issue. Even if there were acceleration in a technical sense, that is not acceleration out and beyond and different from his proper date of birth order of call, even if there could be considered some technical acceleration in that he may have been called up as a delinquent when he might not have been called up as a non-delinquent at that particular moment, even though it would be within the proper order of call at that time which was based upon oldest men going up first, or being called up first, even if there were this technical acceleration, still I do not find this so-called affectation or prejudicial affection of substantial rights, or prejudice to substantial rights of the Defendant Davis that in my view the cases in the Ninth Circuit and cases elsewhere, including Gutknecht, require as a part of acceleration in order to hold that a defendant should not have been convicted or should not be convicted for violation of the order for induction" (3a-4a).

Judge Hauk went on to hold that:

"... even though he didn't take his physical examination, and there was no statement of acceptability, that is not required, as I see it, under 1631.7, a regulation which has not been outlawed or declared unconstitutional or illegal by Gutknecht, and which provides that one who is a delinquent may be selected and ordered to

report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces, and regardless of whether or not a statement of acceptability, DD62, has been mailed to him. And what is a delinquent as defined in 1602.4 of 32 Code of Federal Regulations is a person required to be registered under the Selective Service law who fails or neglects to perform any duty required by him under the terms of the Selective Service Law, and this 1602.4 has not been outlawed either by Gutknecht" (4a).[3]

On the second appeal, the Ninth Circuit, in a short per curiam handed down on August 12, 1971, affirmed the conviction finding no "acceleration" within the meaning of *Gutknecht* v. *United States*, 396 U.S. 295 (1970). 447 F.2d 1376. In addition, the court ruled, without explanation, that the plainly conflicting opinion of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971) was "distinguishable" (11a).

A petition for rehearing with a suggestion for rehearing *en banc* was denied on September 13, 1971 (12a).

On November 12, 1971, a petition for certiorari, No. 71-661, was filed.

In response to the petition for certiorari, the Solicitor General in his initial Memorandum for the United States in Opposition, conceded at page 7 thereof,

"that regulations applicable when [petitioner] was ordered to report permitted local boards to issue in-

[3] In support of these contentions, the district court relied substantially on the reasoning of Judge Neville of the Minnesota District Court in *United States* v. *Crocker*, 313 F. Supp. 831 (1970), which opinion we respectfully submit, is totally in error.

duction orders to delinquents without a prior pre-induction-physical and statement of acceptability, and that [petitioner] received his order pursuant to those regulations."

Following the filing of the petition for certiorari and the Solicitor General's Memorandum In Opposition, the court below, on December 30, 1971, decided the cases of *United States* v. *Fox*, 454 F.2d 593, and *Zack* v. *Benson*, 454 F.2d 596. These decisions held that registrants like petitioner who had been ordered to report for induction as delinquents pursuant to 32 C.F.R. 1631.7(b), and whose delinquency status had stemmed from the failure to report for a pre-induction physical examination, were illegally ordered for induction as a matter of law under this Court's decision in *Gutknecht* v. *United States, supra.*

These cases were brought to the attention of this Court by way of a Supplemental Memorandum. The Solicitor General, in response, filed his own Supplemental Memorandum For the United States In Opposition. At page 2 thereof, it was conceded that

> "the holdings in *Fox* and in the present case are inconsistent . . ."[4]

Nevertheless, he urged this Court to deny certiorari on the theory that,

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[4] The statement by the panel sitting in *Fox, supra*, that "the nature of the delinquency" did not appear in petitioner's case, 454 F.2d at 594, was, with all due respect, plainly erroneous. The record in this case clearly divulges, and the government acknowledged both before this Court and before the Ninth Circuit in its unsuccessful Petition for Rehearing in *Fox*, at page 11 thereof, that the basis for petitioner's delinquency was identical to Fox's—failure to report for a physical examination.

"the conflict is an intra-circuit one and presumably will be resolved by the Ninth Circuit itself . . . " *Id.*

Thereafter, certiorari was denied on February 22, 1972, 405 U.S. 993 (13a). In light of the Solicitor General's suggestion that the conflict between *Fox, supra,* and petitioner's case be resolved by the Ninth Circuit itself, the denial of certiorari seemed understandable. See *United States ex rel. Robinson* v. *Johnston,* 316 U.S. 649 (1942); *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

Accordingly, a motion for an extension of time in which to file an out of time petition for rehearing with a suggestion for rehearing *en banc* accompanied by the petition for rehearing *en banc* itself was tendered to the Court below on April 19, 1972. The petition requested the Court to resolve the concededly existing conflict between the opinion in *Davis II,* 447 F.2d 1376, and *Fox,* 454 F.2d 593.[5]

On May 22, 1972, however, the Ninth Circuit denied the motion and returned the petition for rehearing to petitioner's counsel (14a).

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[5] It is difficult to imagine a case which could more clearly have warranted *en banc* reconsideration than petitioner's; especially in view of the government's own attempts to secure a rehearing in *Fox.* Indeed, the panel which decided the opinion below appeared to have recognized the need, at least procedurally, for such an *en banc* determination of petitioner's case. See *Davis III* at n. 1 (19a).

Further, neither the passage of time, *Huddelston* v. *Dwyer,* 322 U.S. 232 (1944), nor the prior denial of certiorari, *Braniff Airways Inc.* v. *Curtiss-Wright Corp.,* 424 F.2d 427, 429-430 (2d Cir. 1970); *Meehan* v. *Macy,* 425 F.2d 469 (D.C. Cir. 1968), was a bar to rehearing *en banc* at that time. Cf. *Davis* v. *Balkcom,* 369 U.S. 811 (1962). See also, Stern and Gressman, SUPREME COURT PRACTICE 213-215 (1969). The petition, under Ninth Circuit law, could also have been properly construed as a timely motion to recall the mandate. *Munoz and Tigar* v. *United States District Court for the Central District of California,* 446 F.2d 434, 436 (9th Cir. 1971).

Thereafter, on June 5, 1972, the District Court spread the judgment of this Court denying certiorari and remanded petitioner to custody[4] to begin serving his sentence of three years imprisonment. At the same time, petitioner's motion seeking relief under 28 U.S.C. §2255 was forthwith denied (16a). Motions made for bail pending an appeal of the denial of the §2255 motion as well as a motion under F.R. Cr. P. 35 for reduction or modification of sentence were taken under advisement. The Rule 35 motion was thereafter granted by the district court and petitioner was subsequently released from incarceration after having served a total of four months of his three year term and he was ordered placed on probation for the remainder.

An appeal to the Ninth Circuit from the summary denial of relief under 28 U.S.C. §2255 followed and it is from that decision affirming the denial of post-conviction relief, 472 F.2d 596 (18a), for which certiorari is here sought.

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[4] Petitioner had been at large on $10,000.00 bail pursuant to orders of Mr. Justice Douglas dated November 27, 1971 and January 8, 1972.

REASONS FOR GRANTING THE WRIT

I.

The decision below is in direct conflict with this Court's decisions in *Kaufman* v. *United States*, 394 U.S. 217 (1969) and *Sanders* v. *United States*, 373 U.S. 1 (1963) holding that an intervening change in the law, after appellate affirmance of a conviction, may be considered in a post-conviction proceeding.

Declaring that the issues tendered by the petitioner on his motion under 28 U.S.C. §2255 were

> "precisely the same as the ones presented and decided adversely to [him] in *United States* v. *Davis*, 447 F.2d 1376 (9th Cir. 1971), cert. denied 405 U.S. 933 (1972)" [1] (19a),

the Court below held that its prior decision in *Davis II*, *supra*, "is the law of the case," *ibid.*, and thus, relief under §2255, was barred. In support of this ruling the court below relied upon its prior decision in *Odom* v. *United States*, 455 F.2d 159 (9th Cir. 1972).

The decision below is fundamentally at odds with this court's decisions in *Kaufman* v. *United States*, 394 U.S. 217 (1969) and *Sanders* v. *United States*, 373 U.S. 1 (1963). See also *Thornton* v. *United States*, 368 F.2d 822, 831 (D.C. Cir. 1966) (dissenting opinion of Wright, C.J.); *Tucker* v. *United States*, 427 F.2d 615, 617-618 (D.C. Cir. 1970);

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[1] Hereinafter referred to as *"Davis II."*

United States v. *Sorenson*, 308 F. Supp. 1268, 1271 (E.D.N.Y 1970).

Petitioner here has claimed that the intervening decisions of the Ninth Circuit in *United States* v. *Fox*, 454 F.2d 593 (1971) and *Zack* v. *Benson*, 454 F.2d 596 (1971), rendered while his petition for certiorari in *Davis II* was pending, effected a change in the law of the Ninth Circuit. The Solicitor General so conceded. See Supplemental Memorandum for the United States in *Davis* v. *United States*, No. 71-661 (Oct. Term, 1971), at p. 2. Such a change in law has been explicitly recognized as a ground for post-conviction collateral relief notwithstanding the existence of a previous affirmance of a conviction. In *Sanders* v. *United States*, *supra*, this Court, after stating that a §2255 motion was to be subjected to no greater finality limitations than a petition for habeas corpus, 373 U.S. at 14, and accordingly notions of *res judicata* were inapplicable, *id.* at 8, went on to hold that,

> "If purely legal questions are involved, the applicant may be entitled to a hearing upon showing an intervening change in the law . . . " 373 U.S. at 17.

Six years later, in *Kaufman* v. *United States*, *supra*, this Court adopted the rationale of Judge Wright's dissenting opinion in *Thornton* v. *United States*, *supra*, wherein a change in law was specifically cited as a ground for granting relief under §2255. 394 U.S. at 230. See also *Tucker* v. *United States*, *supra*:

> ". . . . at least one of appellant's claims rests upon an intervening change in the law, which would entitle him to a new hearing *even if the merits had been determined*

adversely to him prior to that time." 427 F.2d at 617-18 (footnote omitted) (emphasis added).[8]

A review of the Ninth Circuit's opinion in *Odom* v. *United States*, upon which the decision below rests, reveals that it is based upon two prior Ninth Circuit cases both decided before this Court's opinion in *Kaufman, supra*, and one decided even prior to *Sanders, supra*. In addition, in *Odom*, it was noted that the decision there under construction which had established a change in pre-existing law had itself already spoken to the issue of retroactivity, see 426 F.2d at 74, and limited the new rule announced to the cases of those whose convictions had not become final as of the date of the decision announcing the new rule. Here, however, it is precisely that question which petitioner sought to raise—the retroactive application of the decision in *Fox, supra*.[9]

The effect of the ruling below is that petitioner's collaterally raised constitutional challenge to his conviction will never be heard or determined, unless this Court grants

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[8] The per curiam opinion below seems also to conflict with the Ninth Circuit's own prior holding in *Jack* v. *United States*, 435 F.2d 317 (1970), wherein it was stated that,

> "The fact that the legal claim has been determined in an appellate proceeding by this court is not necessarily determinative in a section 2255 proceeding. There are circumstances where the district court would be compelled, even in the face of such an appellate determination, to hold an evidentiary hearing on the claims of a federal prisoner." 435 F.2d at 319.

[9] No valid reason appears to grant relief to the petitioner in *Zack* v. *Benson, supra*, who had ignored the regular appellate process, see *Sunal* v. *Large*, 332 U.S. 172 (1946), and to deny it to petitioner. If anything, the fact that petitioner did not appeal makes him more entitled to relief than Zack. See *Sunal* v. *Large, supra*, at 181.

certiorari.[10] The procedural posture in which petitioner has thus become entangled is the result of a complete and utter disregard for the holdings of this Court in *Kaufman* v. *United States, supra,* and *Sanders* v. *United States, supra.* The action of the Court below is the functional equivalent of a suspension of the writ of habeas corpus because of erroneous notions of finality. Cf. 28 U.S.C. §2244. The petition should be granted so that this Court can clarify whether there are any limitations on the right to obtain post-appellate review of a conviction, when there is an intervening change of law in the defendant's benefit.

II.

The decision below should be vacated because it is in irreconcilable conflict with other decisions of the Ninth Circuit and that Court has repeatedly declined to resolve the conflict.

All parties to this litigation apparently agree that the decisions below are in direct conflict with *United States* v. *Fox* and *Zack* v. *Benson,* both *supra.*[11] See *supra,* pp. 8-9.

The reasoning and decision in *Fox* may be summarized as follows:

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[10] All attempts by petitioner to seek *en banc* resolution of his own case and thus to harmonize conflicting Ninth Circuit decisions, see pp. 8-9, *supra,* have been futile. See *Maggio* v. *Zeitz,* 333 U.S. 56, 59-60 (1947); *Dickinson* v. *Petroleum Corporation,* 338 U.S. 508 (1949); *John Hancock Mutual Life Insurance Company* v. *Bartels,* 308 U.S. 180 (1939). Compare, *Robinson* v. *Johnson, supra; Wisniewski* v. *United States, supra.*

[11] See also *United States* v. *McClintock,* 311 F.Supp. 1119 (N.D. Cal. 1970); *Swartz* v. *United States,* 3 SSLR 3424 (C.D. Cal. 1970).

32 C.F.R. §1642.4, at all times pertinent, described a selective service delinquent as one who has

> "failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction . . ."

In *Gutknecht* v. *United States,* 396 U.S. 295 (1970), the duty transgressed was the requirement that a registrant have in his personal possession a registration certificate and current classification notice. 32 C.F.R. §§1617.1; 1623.5. In *Fox,* the case was identical to *Peet* v. *United States,* 399 U.S. 523 (1970), vacating 420 F.2d 549 (9th Cir. 1969), where the petitioner had been convicted of failing to report for induction as a delinquent—his delinquency status stemming from a prior refusal to undergo a pre-induction physical examination in violation of 32 C.F.R. §1627. See also *United States* v. *Kohls,* 441 F.2d 1076 (9th Cir. 1971).

Delinquency status, prior to the decision in *Gutknecht,* permitted, *inter alia,* three types of action to be taken by a local board which would hasten a registrant's induction. First, he could be reclassified from a deferred or exempt status into classification I-A (available for military service). 32 C.F.R. §1642.12. Second, a registrant in Class I-A, either classified properly or as a result of a "punitive reclassification" under 1642.12, *supra,* could be inducted prior to all other registrants under the then prevailing regulatory scheme. See 32 C.F.R. §§1642.13; 1631.7; *Gutknecht, supra* at 298. The third possibility, is that 32 C.F.R. §1631.7, as then in effect, permitted the induction of a registrant who was delinquent and I-A

> "notwithstanding the fact that he has not been found acceptable for service in the armed forces and has not

been mailed a Statement of Acceptability (DD Form No. 62)." 32 C.F.R. §1631.7 (1963).

Other than delinquents, the only registrants who could be inducted without a pre-induction physical examination were volunteers, 32 C.F.R. §1628.10 (1951), or conscientious objectors classified I-O. 32 C.F.R. §1660.20(a); *United States* v. *Hayden*, 445 F.2d 1365, 1370 (9th Cir. 1971).

Thus, delinquent registrants such as Fox and petitioner Davis could be subjected to a third form of treatment which is no less in violation of the congressional mandate, relied upon by this court, in *Gutknecht, supra,* that

> "selection of persons for training and service [be carried out] in an impartial manner." 50 U.S.C. App. §455(a)(1) (1965 ed., Supp. IV). 396 U.S. 304.

As was Fox, petitioner was unarguably ordered to report for induction as a delinquent. He also had been declared delinquent for failing to report for a physical examination. Pursuant to 32 C.F.R. §1631.7(a), he also was selected and ordered to report for induction notwithstanding the fact that he had not taken a physical examination and thus (1) had not been found acceptable for service in the Armed Forces, and (2) had not been mailed a new "Statement of Acceptability" (DD Form No. 62) to that effect. *But for his being declared delinquent, he could not have been ordered to report for induction* under then existing regulations[12] without being found acceptable for service and with-

[12] Section 1631.7(a) was amended by Executive Order No. 11537, 35 F.R. 9991, of June 16, 1970 to provide that:

> "Notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I-A or Class

out being mailed a Statement of Acceptability.[13] Since the delinquency regulations have been declared unauthorized and constitutionally invalid, petitioner's induction order based solely upon his status as a delinquent must also be held to be invalid. *United States* v. *Fox, supra; Zack* v. *Benson, supra.*

I-A-O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such a case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined."

As recognized by the *Fox* panel, 454 F.2d at 596, n. 2, this amendment is the simple answer to the fear of Judge Hauk (5a) and perhaps shared by the *Davis II* panel, that the Selective Service System would somehow cease to function if petitioner's arguments prevail.

[13] The government, in its petition for rehearing in *Fox* at p. 17, argued that the application of *Gutknecht* to cases such as *Davis* and *Fox* was improper because no prejudice accrued by virtue of the provisions of ¶3-18 of AR 601-270, SSLR 2246, which required that a complete physical examination be administered on the day of the delinquent's induction. Of course this is still prejudicial, because a registrant who has not been declared delinquent is entitled to both a pre-induction physical examination, 32 C.F.R. §§1628.10 et. seq., and a second physical examination on the day of induction pursuant to Army Regulations, see AR 601-270. But even in the absence of prejudice the government's position misreads the basis of the *Gutknecht* decision. In *Clay* v. *United States*, 403 U.S. 698 (1971) this Court recognized that the federal judiciary had a specific interest in insuring the legal integrity of the Selective Service System by requiring that a man's induction not be accomplished through unlawful means. Quoting its prior decision in *Sicurella* v. *United States*, 348 U.S. 385, 392 (1955), this Court stated that *"the integrity of the Selective Service System demands"* that an induction not be accomplished by illegal procedures. 403 U.S. at 704 (emphasis added). No less can be said for delinquency cases. See *Battiste* v. *United States*, 428 F.2d 801, 802 (5th Cir. 1970).

The effect of this Court's holding in *Gutknecht*, as explicated by the decision in *Fox* is clear: upon petitioner's failure to report for a physical examination, the only option open to the local board consistent with the mandate of the statute, prior to the amendment of §1631.7, was to report him to the United States Attorney for prosecution for that violation. *Fox, supra*, at 596. He could not be alternatively processed for induction. The order was consequently invalid and the indictment should have been dismissed on this ground. By rejecting this argument, the *Davis III* panel's decision creates an intracircuit conflict which now only this Court can resolve, inasmuch as the Ninth Circuit itself has refused to decide the issue either via *en banc* consideration or by a panel decision on the merits (12a, 19a).

Nowhere in the opinion below is there any intimation by the *Davis III* panel that petitioner's case, on its facts, does not come within the *Fox* rule. Rather, relying on *Odom, supra*, there is merely an unexplained refusal to apply *Fox* to *Davis*, "under circumstances such as here presented," 472 F.2d at 596 (19a). What "circumstances" require such a differentiation are left entirely to speculation by the Court of Appeals' cryptic denial of relief.

The bizarre result is that the Ninth Circuit now apparently has *two* rules, the *Fox* rule that a delinquency induction without a pre-induction physical examination is *per se* unlawful, and the contradictory *Davis* rule. District Judges within the Circuit, and, indeed subsequent panels of the Court of Appeals, will be at liberty to choose between the two, and the intracircuit confusion[14] will degenerate into

[14] The prior certiorari petition, *Davis* v. *United States*, 71-661 (Oct. Term, 1971), pp. 8 and 11, n. 3, set forth in some detail the proliferation of confusing decisions within the Ninth Circuit.

chaos unless this Court settles the question. See Stern and Gressman, SUPREME COURT PRACTICE 160-161 (1969).

Certiorari should therefore be granted, the *Fox* rule should be adopted, and the judgment of the Court below should be vacated, with instructions to reverse the district court's denial of post-conviction relief under 28 U.S.C. §2255, and to dismiss the indictment.

III.

Certiorari should be granted because the decisions below, which the Court of Appeals has declared to be in full force and effect, are inconsistent with this Court's decision in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), and in conflict with decisions of the Fifth and Fourth Circuits.

The Court below has declared *Davis II* to be "the law of the case" (19a), notwithstanding its plain inconsistency with its own later decision in *Fox, supra*. This seemingly irrational result was reached because of the holding of the *Davis III* panel that *Odom* v. *United States*, 455 F.2d 159, 160 (9th Cir. 1972) foreclosed consideration of post-appeal charges in the law. Petitioner contends that the Court below erred, that certiorari should be granted to settle the *Odom* question, and that the Court below should be directed to vacate its judgment in *Davis III*, to reverse the district court's denial of post-conviction relief under 28 U.S.C. §2255, and to dismiss the indictment. See Points I and II, *supra*, pp. 11-19. Petitioner also urges that the decisions below are in conflict with *Gutknecht* v. *United States, supra*, and with the decisions of the Fifth Circuit in *Battiste* v. *United States*, 428 F.2d 801 (1970), and of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971).

a) *The "law of the case."* The district court refused to hold that delinquency induction without a pre-induction physical examination, and a statement of acceptability, was in and of itself a violation of the *Gutknecht* doctrine. It took the position that not every delinquency induction was a *Gutknecht* violation, but that it was incumbent on the defendant to prove that his induction was actually "accelerated", by establishing that "he was ordered for induction at a younger age than he would have been had he not been declared a Delinquent" (9a). The *Davis II* panel affirmed, and the *Davis III* panel held this to be the unalterable "law of the case", notwithstanding *Fox's* holding that evidence of acceleration is irrelevant, since a declaration of delinquency causes an induction to be accelerated "as a matter of law", 454 F.2d at 595.

b) *Application of the Gutknecht doctrine.* This Court has never explicitly ruled on the lawfulness of delinquency induction without a pre-induction physical examination. But see *Peet* v. *United States*, 399 U.S. 523 (1970), vacating 420 F.2d 549 (9th Cir. 1969). Petitioner respectfully urges however, that the principle of *Gutknecht*—the invalidation, as Congressionally unauthorized, of all delinquency powers of Selective Service local boards—compels a holding that delinquency induction without a pre-induction physical examination is no less vulnerable than any other exercise of delinquency power. This was the holding in *Fox*, which was articulated after a careful analysis of the regulations, and it has not been challenged or questioned by any subsequent decision.

c) *Inter-circuit conflict.* Assuming as we paradoxically must that *Davis II* is still good law in the Ninth Circuit,

it stands in sharp conflict with decisions of other circuits. In *Battiste* v. *United States, supra,* the Fifth Circuit explicitly declined to be drawn into consideration of acceleration in fact, because even if not proven, "we would hold the induction order invalid. It is expressly based upon a regulation that the Supreme Court held illegal in Gutknecht, and we cannot nullify the clear holding of that court on the basis of isolated observations in the opinion." 428 F.2d at 802.

In *United States* v. *Dobie, supra,* the Fourth Circuit held, somewhat more guardedly than the Fifth Circuit in *Battiste,* that, in the case of a delinquency induction, acceleration is presumed, and the government must sustain a heavy burden to disprove it. The Fourth Circuit expressly rejected opinion evidence of the local board clerk, and carefully outlined the objective documentary evidence which was necessary. Moreover, the Fourth Circuit ruled that the test was not whether younger men were called at the same time as or before defendant, but whether older men were available and uncalled, 444 F.2d at 420-421.

In petitioner's case, the district court on remand after *Davis I* made a finding of no acceleration precisely on the erroneous theory and insufficient evidence rejected by the Fourth Circuit in *Dobie.*

Thus the decisions below are inconsistent with *Gutknecht,* and in sharp conflict with decisions of two other circuits. Certiorari should be granted to clarify the application of the *Gutknecht* doctrine, and to settle the inter-circuit conflict.

CONCLUSION

For all of the foregoing reasons certiorari should be granted and the decision below reversed and the indictment dismissed.

Respectfully submitted,

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1st Court of Appeals Opinion
432 F.2d 1009
(Davis I)

United States v. Davis, No. 26415 (9th Cir. Nov. 9, 1970)

Per curiam: (Chambers, Wright & Kilkenny, JJ.):

The case is remanded without limitation of scope but especially for consideration of the case in the light of the intervening decision of Gutknecht v. United States, 396 U.S. 295.

The parties may make their issues in district court by appropriate motions of either.

Any new appeal should be expedited.

The present bail order will remain in effect.

Oral Findings of District Court After Remand

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As to Issue No. 1, was there an acceleration of the induction of Mr. Davis contrary to the ruling in Gutknecht vs. United States, Supreme Court case. The facts are, and I so find, that the Defendant Davis was given his order for induction on June 20, 1967. He was ordered to report—the reporting date was given, I should say, as July 11, 1967. That appears at page 47 of Exhibit 1. On that date as of that date when he was given this order for induction there were at least four registrants on the delivery list, or the call list, of November 15, 1966 which had been called—who had been called up with birth dates after the birth date of the defendant; the defendant's birthday being July 6, 1946.

These registrants who were on the call for November 15, 1966 having respectively been born as follows: Jenkins, July 24, 1946, Salkin, November 3, 1946, Sayles, November 25, 1946 and Smith, December 4, 1946—excuse me, they were born after, I should say, after Mr. Davis and were on the call prior to his order for induction before he appeared on the delivery list. Therefore being younger than he with—since they were younger than he, he was in the proper order of call within the regular order of call since he was older than they, and they were upon the order of call earlier than he was. I am referring to Exhibit 2, page 2.

Turning to another exhibit here, Exhibit 3, there were no, as far as we know, and as far as appears, no registrants on that call, March 7, 1967, who were younger than the Defendant Davis.

Turning to Exhibit 4, we find 17 on the regular call of July 11, 1967 which is prior to the defendant's date for re-

der of induction who were on that call for the month of July, 1967 the same date that Mr. Davis was on the call list as appears on page 1 as a delinquent. He was on the call list as a delinquent. There were at least 17 others on the same call list who had birth dates after or who were therefore younger than Mr. Davis.

I refer to those listed as having been born in 1947 and testified to by Mrs. Krisinger starting with Burke on page 3 of Exhibit 4, and going over to page 4 winding up with Registrant Harding.

Therefore I must necessarily find, in my view, and do so find, that under the facts the Defendant Davis was not ordered up out of the call, the regular call for registrants for induction on the regular delivery list when he was called up. As a matter of fact, there were 17 plus 4—21 others were younger than he who were called up either before or at the same time he was on the order of call, and to me that means that there was no acceleration.

Now, turning to the second issue. Even if there were acceleration in a technical sense, that is not acceleration out and beyond and different from his proper date of birth order of call, even if there could be considered some technical acceleration in that he may have been called up as a delinquent when he might not have been called up as a non-delinquent at that particular moment, even though it would be within the proper order of call at that time which was based upon oldest men going up first, or being called up first, even if there were this technical acceleration, still I do not find this so-called affectation or prejudicial affection of substantial rights, or prejudice to substantial rights of the Defendant Davis that in my view the cases in the Ninth Circuit and cases elsewhere, including Gutknecht, require

as a part of acceleration in order to hold that a defendant should not have been convicted or should not be convicted for violation of the order for induction.

It seems to me—well, I so find that here there was no prejudicial effect upon the substantial rights of Davis. We don't have here, as there were in the Thaxter case, United States vs. Paul Norman Thaxter, Court of Appeals Ninth Circuit No. 25709, January 8, 1971, there was no substantial affectation of his rights by prejudicial result upon any conscientious objector claim as there was in Thaxter. We don't have that here in Davis.

I don't see any other prejudicial effect, because even though he didn't take his physical examination, and there was no statement of acceptability, that is not required, as I see it, under 1631.7, a regulation which has not been outlawed or declared unconstitutional or illegal by Gutknecht, and which provides that one who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact he has not been found acceptable for service in the Armed Forces, and regardless of whether or not a statement of acceptability, DD62, has been mailed to him. And what is a delinquent as defined in 1602.4 of 32 Code of Federal Regulations is a person required to be registered under the Selective Service law who fails or neglects to perform any duty required by him under the terms of the Selective Service law," and this 1602.4 has not been outlawed either by Gutknecht.

So my conclusions of law on these two issues are that based upon the findings of fact that I have made just now are that No. 1 there is no violation of the strictures of Gutknecht in that there was no acceleration of the kind outlawed by Gutknecht; and secondly, if there was any acceleration of the induction, when I said acceleration I

meant acceleration of induction—I wish the notes to show that. I don't find any acceleration of induction as a matter of law; and secondly, assuming there was acceleration of induction in a technical sense as a matter of law, still there was no affectation prejudicially or adversely of the defendant's substantial rights under the Military Selective Service Act of 1967 or otherwise.

There is no violation of constitutional rights in what was done here by this Draft Board 101.

It is my conclusions buttressed by reasoning that I found in United States vs. Crocker, which I think essentially points up why the court must come to this conclusion. Where you have a defendant, as pointed out in Crocker, and I think we have a situation here, who refuses to report for physical examination, as here and as in Crocker, if we were to follow the line of argument presented by the defense here we would have to say he would then be declared a delinquent. But having been declared a delinquent he could not be ordered for induction because as a delinquent that would "accelerate his induction" and automatically adversely affect his substantial rights. All he would have to do is not report for induction. Then he could be free from ever being prosecuted for failing to report for induction.

Such an argument, it seems to me, would stultify and render negatory and completely unworkable the entire Selective Service System. Every registrant, if he didn't want to go in, could avoid prosecution merely by refusing to take his physical, waiting until he is declared delinquent, called up for induction, even though he is within his age group and probably within the regular call by age. In other words, younger people had already been called before him and at the same time, younger people than he. He could just sit

and refuse to go up on the order for induction after having refused to take the physical and then not be prosecuted on a theory that there was a sort of automatic acceleration that way, an automatic adverse affectation prejudice to his substantial rights.

Now, the most the Ninth Circuit has said in my view is that if there is an acceleration, and they said this in the Thomas case, if there is an acceleration and if the acceleration adversely affects—prejudicially affects the substantial rights of the defendant, then the induction order is void under Gutknecht, and he cannot be convicted. But whereas here there is no acceleration out of the natural and ordinary and regular order of call, whether it be as here in the Davis case under the call by age groups, the oldest first in a given year of birth and the youngest next, and where the defendant has been called up even as a delinquent after others have been put on the call who are younger than he, where we have that situation, and particularly where we don't have any substantial prejudice or adverse effect upon his substantial rights, that is where we don't have the Thaxter situation where the delinquency classification and the order for induction substantially affected his rights—because as pointed out in Thaxter it adversely affected his rights to claim conscientious objector status. Where we don't have those things, it seems to me the Gutknecht decision of the Supreme Court does not require reversal of conviction for failure to report for induction as ordered.

District Court's Findings of Fact and Conclusions of Law After Remand

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 3207-AAH-CD

On Appeal: No. 26415

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

JOSEPH ANTHONY DAVIS,

Defendant.

This matter came before the Honorable A. Andrew Hauk, United States District Judge, on February 2, 1971, for hearing on remand pursuant to order of the Court of Appeals for the Ninth Circuit dated November 9, 1970. During the hearing, the Government presented testimonial evidence and documentary evidence (Exhibits 2, 3, 4 and 5). Arguments were heard on defendant's Motion For Judgment of Acquittal On Remand and the Government's opposition thereto. The Court having heard the oral arguments, testimonial evidence, and having considered the memoranda of counsel and all the files and records of this case, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Defendant Joseph Anthony Davis is a registrant of Local Board No. 101, Los Angeles, California, having registered on October 4, 1963.

2. Defendant was ordered to report for Physical Examination on October 8, 1965, and, failing to do so, was declared Delinquent on May 4, 1966.

3. Defendant was never mailed a Statement of Acceptability (DD Form 62).

4. On June 20, 1967 defendant was ordered by Local Board 101 to report as a Delinquent for induction on July 11, 1967.

5. There were at least 17 other non-Delinquent registrants of Local Board 101, excluding Volunteers, who were ordered to report for induction on July 11, 1967, on the regular Delivery List and who were younger than defendant.

6. At least 4 non-Delinquent registrants of Local Board 101, who were not Volunteers, and who were younger than defendant, were ordered to report for induction as early as November 15, 1966.

7. Had defendant not been declared Delinquent, he would have been ordered to report for induction on or before November 15, 1966.

8. Had defendant reported as ordered on July 11, 1967, he would have been given a complete physical examination prior to being inducted.

9. To the extent these Findings of Fact also contain Conclusions of Law, they shall be deemed incorporated within the Conclusions of Law.

Conclusions of Law

1. The Delinquency Regulations may not be used to deny a registrant a deferment or exemption or to accelerate his induction.

2. At all times relevant to this case, defendant was properly classified 1-A and was not entitled to any deferments or exemptions.

3. A registrant's induction as a Delinquent is considered "accelerated" within the meaning of *Gutknecht* v. *United States*, 396 U.S. 295 (1970), when he is ordered for induction at a younger age than he would have been had he not been declared a Delinquent. Accordingly, defendant's induction order was not "accelerated."

4. Selective Service Regulation 1631.7 (32 C.F.R. 1631.7) is not unconstitutional on its face and is not unconstitutional as applied to Delinquents except when it is used to accelerate their induction orders.

5. Defendant's substantial rights were not prejudiced by the Local Board's ordering him to report for induction without first giving him a physical examination and sending him a Notice of Acceptability (DD Form 62). The failure to give such an examination and such Notice of Acceptability were caused by defendant's own failure to report for physical examination on October 8, 1965, as

ordered; moreover, he would have received a complete physical examination prior to induction had he reported on July 11, 1967, as ordered.

6. To the extent these Conclusions of Law also contain Findings of Fact, they shall be deemed incorporated within the Findings of Fact.

Order

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is ordered:

(1) That the motion of defendant Joseph Anthony Davis for judgment of acquittal be denied; and

(2) That the judgment of conviction heretofore entered is hereby affirmed.

It is further ordered that the foregoing Findings of Fact and Conclusions of Law and this Order be transmitted forthwith to the Court of Appeals for the Ninth Circuit together with the record on appeal and memoranda, transcript and Exhibits of the proceedings on remand.

It is further ordered that the cost of the transcript on remand shall be borne by the Government.

Dated this 16th day of March, 1971.

A. Andrew Hauk
United States District Judge

2nd Court of Appeals Opinion
447 F.2d 1376
(Davis II)

United States v. Davis, No. 26,415 (9th Cir. Aug. 12, 1971)

Per curiam (Chambers, Kilkenny & Powell, JJ.):

The judgment of conviction in this selective service case is affirmed.

Davis contends that the implication of Gutknecht v. United States, 396 U.S. 295, and other cases require a finding here that induction was accelerated because of his delinquency. On the record, we think not.

United States v. Davis (9th Cir. 1970), 432 F.2d 1009; Hirschhiser v. United States (9th Cir. July 22, 1971) 71-1301; and United States v. Pennington (9th Cir. 1971), 439 F.2d 145, require affirmance. We find United States v. Dubie (4th Cir., June 28, 1971) #14,236, distinguishable.

The mandate will issue now.

Order of Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

No. 26,415

United States of America,

Plaintiff and Appellee,

—v.—

Joseph Anthony Davis,

Appellant.

Before:

Chambers and Kilkenny, *Circuit Judges*, and Powell, *District Judge*.

The petition for a rehearing is denied. The suggestion for a rehearing en banc is rejected.

All active circuit judges of the court have been advised of the suggestion for a rehearing en banc and none has requested it.

Order Denying Certiorari

No. 71-661

JOSEPH ANTHONY DAVIS,

Petitioner,

v.

UNITED STATES.

405 US 933, 30 L Ed 2d 809, 92 S Ct 939.

February 22, 1972. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

Same case below, 447 F2d 1376.

Order Denying Out of Time Petition for Rehearing en Banc

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 26415

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH ANTHONY DAVIS,

Appellant.

Appeal from the United States District Court
Central District of California

Before:

CHAMBERS and KILKENNY, *Circuit Judges,* and POWELL, *District Judge.**

It appearing that the Supreme Court of the United States denied certiorari in this cause on the 22nd day of February, 1972, and that a "Motion for Extension of Time in Which to File a Petition for Rehearing" and other relief, was not tendered for filing in this court until the 19th day of April, 1972,

IT IS ORDERED that the tender be, and the same is hereby, rejected and the Clerk is directed to return the motion to the appellant.

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* The Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

Reporter's Transcript of Proceedings Denying Petitioner's Motion Under 28 U.S.C. §2255

IN THE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE A. ANDREW HAUK, *Judge Presiding*

Case No. 3207—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ANTHONY DAVIS,

Defendant.

Place: Los Angeles, California

Date: Monday, June 5, 1972

Los Angeles, California, Monday, June 5, 1972 10:00 A.M.

(Other court matters.)

The Clerk: Number Three on the calendar, 3207 Criminal, United States of America versus Joseph Anthony Davis.

Mr. Sweeney: Paul Sweeney for the Government, your Honor.

Mr. Kallen: Good afternoon, your Honor, Daniel Kallen for the defendant who is present.

* * * * *

The Court: * * *

We are now filing and spreading on the record the following, and I will take them by chronology.

September 13, 1971, the order of the Court of Appeals denying the petition for rehearing, also denying the suggestion for rehearing in blank.

November 11, 1971, the denial of the motion to recall the mandate.

February 28, 1972, denial of petition for writ of certiorari. This is by the Supreme Court of the United States and a certified copy was dated in the Court of Appeals May 31, 1972.

Finally, May 22, the order of the Court of Appeals rejecting a tendering of motion for extension of time in which to file a petition for rehearing with the direction that the motion be returned to the appellant.

All right, those in that order are hereby filed and spread.

Now, the defendant is here before the Court for the commitment under the mandate of the Court of Appeals and the Supreme Court.

In that connection, counsel for the defendant has filed here this afternoon and the Court has read and considered the motion pursuant to 28 U.S. Code 2255, or in the alternative, a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure—denied.

There is also a motion to enlarge the defendant on bail pending disposition of these motions pursuant to 28 U. S.

Code 2255 and Rule 35 of the Federal Rules of Criminal Procedure—denied.

We are ready for the commitment.

The defendant is committed. The marshal will take him into custody for the service of his sentence.

Mr. Kallen: Thank you, your Honor.

The Court: All right.

Third Court of Appeals Opinion
472 F.2d 596
(Davis III)

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 72-2438

Dec. 26, 1972

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH ANTHONY DAVIS,

Defendant-Appellant.

Before:

CHAMBERS and KILKENNY, *Circuit Judges,* and TAYLOR,* *District Judge.*

Prisoner moved to vacate judgment. The United States District Court for the Central District of California, A. Andrew Hauk, J., denied motion and the prisoner appealed. The Court of Appeals held that where issue was decided on direct appeal from conviction it could not be relitigated on motion to vacate judgment as the decision on direct appeal was the law of the case.

Affirmed.

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* The Honorable Fred M. Taylor, Senior District Judge for the District of Idaho, sitting by designation.

PER CURIAM:

This is an appeal from the denial of appellant's 28 U.S.C. § 2255 motion. The issue here presented is precisely the same as the one presented and decided adversely to appellant in United States v. Davis, 447 F.2d 1376 (CA9 1971), cert. denied 405 U.S. 933, 92 S.Ct. 939, 30 L.Ed.2d 809 (1972).

This circuit is firmly committed to the rule that where an issue has been decided on direct appeal from a conviction, it cannot be relitigated again on a § 2255 motion. The decision on the direct appeal is the law of the case. Odom v. United States, 455 F.2d 159, 160 (CA9 1972). Appellant argues that United States v. Fox, 454 F.2d 593 (CA9 1971) created new law by overruling United States v. Davis and that he should be permitted to fall within the perimeter of the new rule. Aside from the fact that *Fox* does not even suggest overruling *Davis*, *Fox*, 454 F.2d p. 594,[1] the new law, or change in law, rule is not applied in this circuit under circumstances such as here presented. Odom v. United States, *supra*.

Judgment affirmed.

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[1] For that matter, an in banc proceeding would be required to overrule a previous panel decision.

Selective Service File—Minutes of Action

(Registrant Will Make No Entries on This Page)

Date	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President
FEB 3 1965	1A 1A
FEB 3 1965	Form 110 Mailed
FEB 16 1965	SSS Form 223 mailed for physical on MAR 4 1965
3-25-65	SSS Form 225 dtd 3-17-65 shows failed to report for Pre-
JUL 29 1965	SSS Form 127 mailed
SEP 19 1965	SSS Form 223 mailed for physical on OCT 8 1965
10/21/65	Jacket returned - failed to report for physical
12/6/65	Mailed Cal Form 301
2 1966	SSS Form 127 mailed
1966	R.L. Smith
5/1/66	SSS Form 301 mld to reg.; cc to SSO
FEB 21 1967	SSS Form 252 mailed for Induction on MAR 7 1967 PAPERS RET - FAILED
MAR 17 1967	File sent to SSO
Apr 4, 1967	File returned from SSO
APR 20 1967	SSS Form 252 mailed for Induction on MAY 11 1967 no del
8/23/67	SSS Form 150 issued to registrant.
NOV 15 1967	File sent to SSO —10-25-67 File ret'd from SSO.
11-6-67	SSS NCSC 301 mld to US ATTORNEY, CC SSO
11/22/67	File forwarded to Southern Area Hqs. for prosecutive study
	Lacy Sutherland (Davis) 226-0432

(Continued on Page 7)

21a

Selective Service File—Delinquency Warning

Approved By The Director of Selective Service

Mailed April 6, 1966
To
[illegible]
[illegible], Calif.

SELECTIVE SERVICE SYSTEM
STATE OF CALIFORNIA
DELINQUENCY WARNING

Local Board No. 101
Los Angeles County
1300 Eastwood Blvd.
Los Angeles Calif. 90024
(Local Board Stamp)

December 6, 1965
(Date of Mailing)

Selective Service No.			
4	101	46	826

To Joseph Anthony DAVIS
(First) (Middle) (Last)

Address P.O.Box 46-243
(Street and Number or RFD Route)

Los Angeles Calif. 90046
(City, Town, or Village) (County) (State) (Zip Code)

You are hereby notified that this Local Board is considering declaring you to be delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Failed to report for Armed Services physical examination on October 8, 1965.

You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, and such failure may result in your being declared delinquent. A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants.

This Local Board may excuse your delinquency status if it finds that the reason for noncompliance was not willful and you comply. In any event, this document becomes part of your permanent Selective Service file and should such delinquency be excused any other noncompliance on your part could result in your immediate induction.

32

(SSS Form 304)

Emilie W. Chapman
(Member or Clerk of Local Board)
Emilie W. Chapman, Clerk

Selective Service File—Delinquency Notice

SELECTIVE SERVICE SYSTEM

DELINQUENCY NOTICE

May 4, 1966
(Date Became Delinquent)

May 4, 1966
(Date of Mailing)

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Stamp)

SELECTIVE SERVICE NO.			
4	101	46	88

To Joseph (First) Anthony (Middle) Davis (Last)

Address 3761½ Manlo
(Street and Number or RFD Route)

Los Angeles (City, Town, or Village) L.A. (County) California (State)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Failed to report for Armed Forces Physical Examination Oct. 8, 1965.
Failed to keep Local Board informed of current address.

2. You are hereby directed to report to this local board immediately, either in person or by mail.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment.

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W. K. Bishop (Clerk of Local Board)

SSS Form No. 304 (2-64)

(See Instructions on Reverse Side)

23a

Selective Service File—1st Order to Report for Induction

SELECTIVE SERVICE SYSTEM

Approved Not Required.

ORDER TO REPORT FOR INDUCTION

RECEIVED
LOCAL BOARD GROUP "C"
FEB 23 1967

Local Board No. 101
Los Angeles County
1901 Westwood Blvd.
Los Angeles, Calif. 90024

(Local Board Number)

President of the United States,

To

Joseph Anthony Davis
3781 Pueblo Avenue
Los Angeles, California 90007

1901 WESTWOOD BLVD
LOS ANGELES, CALIF. 90024

February 21, 1967
(Date of mailing)

SELECTIVE SERVICE NO.			
4	101	46	328

1-A

ING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report
L.A. EXAMINING AND INDUCTION STATION
1033 S. Broadway, Los Angeles, Calif.
(Place of reporting)

MAR 7 1967 at 7:30 A.M.
(Date) (Hour)

warding to an Armed Forces Induction Station.

E. M. Bush
(Member or clerk of Local Board)

E.M. Bush

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

F YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL D OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU E CLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY SICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT EADY FURNISHED TO YOUR LOCAL BOARD.

ld documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be e take the following with you when reporting to the induction station. The documents will be returned to you. (a) LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a d copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the sig- and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claim- (1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for sup- and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits owing that dependency.

ring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Adminis- tion. If you have life insurance, bring a record of the insurance company's address and your policy number. enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

he Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to duction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

u may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hard- if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared ceive your reemployment if you are not inducted. To protect your right to return to your job if you are not inducted, st report for work as soon as possible after the completion of your induction examination. You may jeopardize your employment rights if you do not report for work at the beginning of your next regularly scheduled working period after you returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprison- t. Bring this Order with you when you report.

23

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, ediately to any local board and make written request for transfer of your delivery for induction, taking this Order

(Previous editions may be used until exhausted.)

Selective Service File—2nd Order to Report for Induction

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

DELINQUENT

Local Board No. 78
Los Angeles County
1701 Westwood Blvd.
Los Angeles, Calif. 9[illegible]

The President of the United States,

To

Joseph Anthony Davis
868 Carrol Avenue
St. Paul, Minnesota

June 20, 1967

4	101	46	88

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report

L.A. Examining and Entrance Station
1033 S. Broadway, Los Angeles, Calif.

on July 11, 1967 at 7:30 A. M.

for forwarding to an Armed Forces Induction Station.

W. M. Bishop

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE [illegible] GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE A PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters [illegible] to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostatic certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than the dependent)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavit establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of your

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any unfavorable hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then begin to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

47

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order

1-17-[illegible]

SSS Form 252 (Revised 6-20-66) (Previous printings may be used until exhausted.)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner asserts that his order to report for induction was unlawful because it was issued after he had been declared delinquent, allegedly in violation of the principles enunciated in *Gutknecht* v. *United States*, 396 U.S. 295. He also claims that his motion under 28 U.S.C. 2255 to vacate his sentence should have been granted because his substantive contention, previously rejected by the court of appeals, was thereafter accepted in a different case by another panel of the same court.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of having failed to report for induction in July 1967, in violation of 50 U.S.C. App. 462, after he had been declared delinquent for failure to report for earlier physical examinations. He was sentenced

to three years' imprisonment. The court of appeals remanded the case to the district court "without limitation of scope but especially for consideration of the case in the light of the intervening decision of Gutknecht v. United States, 396 U.S. 295" (432 F. 2d 1009; Pet. App. 1a). Following an evidentiary hearing, the district court found that petitioner's induction order had not in fact been accelerated because of his delinquency status, and that *Gutknecht* was therefore inapplicable; it accordingly declined to set aside the earlier conviction (Pet. App. 7a-10a). The court of appeals then affirmed *per curiam* (447 F. 2d 1376; Pet. App. 11a).

While a petition for a writ of certiorari was pending in this Court, a different panel of the court of appeals decided *United States* v. *Fox*, 454 F. 2d 593, which held on facts similar to those in this case that under Selective Service regulations the induction order was invalid as a matter of law if it followed a failure to report for a physical examination and an ensuing delinquency determination. In our Supplemental Memorandum in Opposition, we acknowledged that *Fox* was inconsistent with the earlier decision in this case, but we nevertheless urged that certiorari be denied, because (1) the earlier decision was, in our view, the correct one, (2) the conflict was only within the Ninth Circuit and presumably would be resolved by that court in later cases, and (3) the issue was not of continuing importance since the pertinent regulations had been amended to make clear that a registrant's failure to report for a physical examination would not preclude a timely order to report for induction (p. 2). This Court denied certiorari on February 22, 1972 (405U.S. 933; Pet. App. 13a).

Nearly two months later, petitioner filed in the court of appeals a "Motion for Extension of Time in Which

to File a Petition for Rehearing." The court of appeals, noting that certiorari had been denied on February 22, 1972, and that the motion "was not tendered for filing in this court until the 19th day of April, 1972," rejected the tender and ordered the clerk to return the motion to petitioner (Pet. App. 14a).

Petitioner thereafter filed the present motion under 28 U.S.C. 2255, raising the same issues that had previously been adjudicated against him and urging that the intervening *Fox* decision required that his sentence be vacated. The district court denied the motion (Pet. App. 15a-17a), and the court of appeals affirmed (472 F. 2d 596; Pet. App. 18a-19a). The court of appeals held (1) that *Fox* had not overruled the earlier panel decision in this case, (2) that petitioner could not, in any event, relitigate collaterally issues already decided against him on direct appeal, and (3) that the rule permitting relitigation where there has been an intervening change in the law "is not applied in this circuit under circumstances such as here presented" (Pet. App. 19a). Petitioner did not seek rehearing or rehearing *en banc*.

1. With respect to petitioner's argument that the writ should be granted because the original panel decision conflicts with *Gutknecht* and with *Fox* (Pet. 14-21), we rely upon our previous Memorandum and Supplemental Memorandum in Opposition (No. 71-661, O.T. 1971), which set forth the relevant facts and answered petitioner's underlying contentions.[1] In our view, the issue

[1] Petitioner's assertion that the court of appeals "has repeatedly declined to resolve the conflict" (Pet. 14) apparently refers only to the original panel's refusal to consider a petition for rehearing tendered almost two months after certiorari was denied on direct appeal, and to the unwillingness of a different panel to permit relitigation of issues finally resolved in the earlier appeal. There is no reason to think that the court would not consider the issue

is of no continuing importance in view of the amendments to the pertinent regulations which formed the basis for the courts' rulings. It is impossible to speculate how many untried indictments there may be involving fact situations similar to the one in this case, but we submit that the court's holding on direct appeal—that the *Gutknecht* principles do not apply—is so clearly correct that there is little reason for this Court to pass upon the so-called defense at this time.[2]

2. Petitioner also contends that, by holding that he may not relitigate issues decided on direct appeal, the decision below conflicts with this Court's decisions in

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en banc if it were timely presented in another case. Indeed, there is no reason to assume the court would not have reheard *this* case *en banc* had petitioner sought such a rehearing.

[2] The cases cited by petitioner as reflecting an inter-circuit conflict are not really in conflict with the decision below (Pet. 19-21). The record in *Battiste* v. *United States*, 428 F. 2d 801 (C.A. 5), contrary to the record here, made it "unequivocally clear that the induction order was based not upon the normal sequence of call but upon appellant's delinquency status" (428 F. 2d at 802). Similarly, in *United States* v. *Dobie*, 444 F. 2d 417 (C.A. 4), the registrant had a deferment before he was declared a delinquent, and even if he had reported as ordered for a preinduction physical examination, it was "equally probable" that he would have been continued in his deferred status rather than ordered for induction as soon as he was (444 F. 2d at 421). Here, petitioner was at all times "properly classified 1-A and was not entitled to any deferments or exemptions" (Pet. App. 9a), and the district court found that if he had reported for his scheduled physical examination, he would have been ordered for induction eight months before he was (Pet. App. 8a).

Petitioner asserted the same inter-circuit conflicts in his earlier petition for certiorari, and we responded fully in our Memorandum in Opposition (pp. 6-8). Even if there were a conflict, it would involve not the decision at issue here but the decision on direct appeal, with respect to which this Court denied certiorari in February 1972.

Kaufman v. *United States,* 394 U.S. 217, and *Sanders* v. *United States,* 373 U.S. 1. Neither case is in point.

Kaufman held that a Fourth Amendment claim could be raised in a collateral proceeding even though it was not, but could have been, raised on direct appeal. The Court did not consider whether a similar rule would apply to statutory or regulatory, as opposed to constitutional, claims, nor whether it would apply where the claim had already been adjudicated on direct appeal.[3]

In *Sanders* the issue was whether an application for collateral relief may be denied solely because the issue was not, but could have been, raised in an earlier application. This Court held that an application may be denied on the basis of a prior denial only if the same ground was previously determined on the merits adversely to the applicant and "the ends of justice would not be served by reaching the merits of the subsequent application" (373 U.S. at 15). As an example of when "the ends of justice" might be thus served, the Court stated: "If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an

---

[3] The Court quoted from and adopted the reasoning of the dissenting opinion in *Thornton* v. *United States,* 368 F. 2d 822 (C.A. D.C.) (394 U.S. at 230-231). The quoted passage contained a suggestion, upon which petitioner relies here, that it might be appropriate for a court to reconsider collaterally a constitutional claim raised and previously decided, "if new law has been made or facts uncovered relating to the constitutional claim" since the appeal. Even this dictum, however, was directed only to constitutional claims and to intervening changes in the law. The claim here relates to the interpretation of Selective Service regulations, and the *Fox* decision, though inconsistent with the original decision in this case, did not overrule it and did not have the determinative effect of an *en banc* decision or of a decision of this Court. Whether this would be "new law" under the *Thornton* dissent is unclear.

intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application" (*id.* at 17). The Court apparently had in mind a case in which the prior application has been decided on the merits and on the same "ground" advanced subsequently, but an intervening change in law has suggested a new legal "argument."[4] In those circumstances, the ends of justice might well be served by considering the new arguments. Here, however, *Fox* did not suggest, and petitioner has not presented, any new legal arguments justifying the application of the *Sanders* rule.

Petitioner urges, in effect, that whenever there is a change in the law, any person who was adversely affected by the prior law is entitled to the advantages of the change by way of collateral relief. Neither *Kaufman* nor *Sanders* establishes such a broad rule of automatic and universal retroactivity, and the court of appeals properly refused to adopt it. Indeed, this Court's numerous decisions dealing with the question *whether* newly announced or developed constitutional principles should be applied retroactively demonstrate that entitlement to the benefit of an intervening change in law is hardly automatic.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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[4] The Court carefully distinguished between a new "ground" for relief, which would entitle an applicant to a new hearing, and a new "argument" relating to the same ground, which ordinarily would not entitle one to a new hearing (373 U.S. at 16).

1033-1973-406

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. The government has previously conceded that the decision in *United States* v. *Fox,* 454 F.2d 593 (9th Cir. 1971), is "inconsistent with the earlier decision in this case [*Davis*]", Mem. Opp., p. 2, and it persists in its position that *Fox,* the latest decision of the Ninth Circuit, is incorrect, and that the conflicting decisions in this case are correct. Mem. Opp., p. 4.[1] It has now also conceded that whether or not the new rule announced in *Fox* is the type of "new law" contemplated by the dissent in *Thornton* v. *United States,* 368 F.2d 822 (D.C. Cir. 1966), adopted

[1] This case presents the anomalous situation of an apparently irreconcilable division within the Ninth Circuit, where the Solicitor General disagrees with *Fox,* the most recent decision, yet vigorously opposes *certiorari,* the only feasible path by which it can be determined if the Ninth Circuit's latest decision is correct, or if the Ninth Circuit's earlier decision, which the Solicitor General favors, is correct.

in *Kaufman* v. *United States*, 394 U.S. 217, 230-231 (1969), "is unclear." Mem. Opp., p. 5, n. 3.[2] These concededly open questions can only be settled by this Court.

Indeed the Ninth Circuit itself seems to have answered the question in petitioner's favor by its decision in *Zack* v. *Benson*, 454 F.2d 596 (9th Cir. 1971), a companion case to *Fox*, granting the petitioner there the identical relief sought by the petitioner here on similar facts, and specifically decided "on the authority of" *Fox*. *Ibid.* The decision in *Zack* (which surprisingly is nowhere dealt with in the Solicitor General's Memorandum) is the answer to the government's qualms regarding "retroactivity."[3]

2. The attempted distinction drawn by the government between "constitutional" and "statutory and regulatory" arguments, Mem. Opp., p. 5, seeking collateral relief is spurious. Petitioner's claim is constitutional, since the operation of the statutorily unauthorized delinquency regulations violated his Fifth Amendment rights to due process. As Chief Judge Zavatt has written:

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[2] The Government may be as unhappy with *Kaufman* as it is with *Fox*. But the vitality of *Kaufman* has been reaffirmed as recently as last term, *Schneckloth* v. *Bustamonte*, —— U.S. ——, 36 L.Ed.2d 854, 875, n. 38, and even the Justices of this Court who would be prepared to reconsider *Kaufman*, limit their concern to collateral attacks based solely on Fourth Amendment claims unaccompanied by any showing of innocence. See Concurring Opinion of Mr. Justice Powell, 36 L.Ed.2d at 879-881. In this case, in sharp contrast, if the delinquency-based induction order was invalid, then petitioner has committed no substantive crime.

[3] Whether the decision in *Zack* v. *Benson* is to be regarded as holding that *Fox* is retroactive, or that *Fox* is not purely prospective, is a question that need not be reached since petitioner is procedurally and substantively entitled to the same relief as Zack.

"The purpose of the decisions in *Breen* [v. Selective Service, 396 U.S. 460 (1970)] *supra* and *Gutknecht* [v. United States, 396 U.S. 295 (1970)] *supra*, read together was to invalidate local board action punishing registrants pursuant to delinquency regulations. The Court held that local boards have no Congressional authorization for such action. The stated purpose is not one which affects a particular procedure in the process of delinquency . . . but, rather, one which invalidates the delinquency procedure in its entirety. Since a local board has no power to punish a registrant by . . . accelerating his induction, it follows a fortiori, that a failure or refusal to obey a local board's induction order, under such circumstances, cannot constitute the basis of a criminal indictment and subsequent conviction thereunder.

"The purpose of the *Breen* and *Gutknecht* decisions, viewed broadly, is immaterial to the fact finding procedures leading to a conviction. The concern is not with the facts upon which a conviction is based but, rather, the principle that the trial should never have taken place."

United States v. *Kelly*, 314 F. Supp. 500, 509 (E.D.N.Y. 1970). See *Bucher* v. *Selective Service System, Local Boards No. 2 Etc.*, 421 F.2d 24, 27-28 (3d Cir. 1970).

As reiterated by this Court in *Breen* and *Gutknecht*, and elucidated by Judge Zavatt, this disconcern with "a particular procedure in the process of delinquency" is exactly why the June 1970 amendments to 32 C.F.R. §1631.7(a) is not a basis upon which to deny certiorari here. At least one court has held even these amendments invalid under

Breen and *Gutknecht*. See *United States* v. *Castillo, et al.*, —— F. Supp. ——, 72 Cr. 153 (D.P.R. March 23, 1973) (Cancio, Ch. J.).[4]

3. The government takes umbrage at petitioner's decision not to attempt for a second[5] time to secure *en banc* review of petitioner's case in the Ninth Circuit. Mem. Opp., pp. 3-4, n. 1. Thus, the Solicitor General speculates that, "there is no reason to assume the court would not have reheard *this* case *en banc* had petitioner sought such a rehearing." *Ibid.* Having been once denied such a rehearing, see n. 5, *supra,* there is no more reason to believe that the court below *would* have heard petitioner's case *en banc*. This Court, in any event, has never suggested that certiorari should not be granted because an *en banc* determination was not *twice* sought in the Court of Appeals. It would be particularly inappropriate to do so in a case involving the denial of relief under the federal habeas corpus statute.[6] See *Harris* v. *Nelson*, 394 U.S. 286, 292 (1969).[7]

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[4] A copy of the *Castillo* opinion is annexed as an appendix to this reply brief. This Court's attention is respectfully invited to pp. 5-7 thereof, wherein Chief Judge Cancio analyzes the Ninth Circuit's decisions in *Fox* and other cases. This analysis is in accord with petitioner's discussion of the significance of these opinions in his first petition for certiorari, No. 71-661, Oct. Term, 1971, at p. 11, n. 8.

[5] What is characterized by the government as a "Motion for Extension of Time in Which to File a Petition for Rehearing," Mem. Opp., pp. 2-3, was in fact a full-fledged petition for rehearing *en banc* accompanied by a lengthy brief in accordance with Rule 35, F. R. App. P. Under applicable Ninth Circuit law, the motion and petition could have been considered. See *Munoz and Tigar* v. *United States District Court for the Central District of California*, 446 F.2d 434, 436 (9th Cir. 1971).

[6] While *en banc* resolution may in some circumstances be a factor affecting the exercise of certiorari jurisdiction, see cases discussed at pp. 9 and 14, notes 5 and 10 respectively of the Petition, it is not in others. See *Switzerland Cheese Assn.* v. *Horne's*

4. The continuing importance of the issue here sought to be reviewed cannot be underestimated. The government's characterization of the effect of any ruling in this case is as strongly supportive of a decision in favor of a grant of certiorari as one denying it:

"It is impossible to speculate how many untried indictments there may be involving fact situations similar to the one in this case. . . ." Mem. Opp., p. 4.[3]

Market, 385 U.S. 23, 24 n. 2, where after the grant of certiorari, which had been motivated by conflicting decisions of the First and Second Circuits, the Second Circuit, *en banc*, reversed its position and thus terminated the conflict. This Court, however, merely noted this fact and proceeded to resolve the case on its merits, reaching a result in accord with the Second Circuit *en banc* determination. See also *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1021-1026 (2d Cir. 1973) (petition for rehearing *en banc* denied); petition for certiorari pending, No. 73-203, Oct. Term, 1973, filed 7/30/73, 42 USLW 3075.

[1] The doctrine of *res judicata* is inconsistent with the purpose and history of habeas corpus. See *Gosa* v. *Mayden*, —— U.S. ——, 37 L.Ed.2d 873, 895, 905-906 (1973) (Dissenting Opinion, Marshall, J.).

[3] Indeed if one wished to speculate, it is not improbable that a large portion of the thousands of young men who are in Canada and other foreign countries in fugitive status on pending indictments in Selective Service cases, departed from the United States after being ordered to report for physical examinations, and were subsequently declared delinquent and ordered to report for induction because of such failure. A grant of certiorari would settle the question of whether *Fox* is the law, or whether the contrary view of the Solicitor General is the law, and help to resolve the dilemmas facing these young men, and members of the Bar who are increasingly being called on to advise them of the legal consequences of their returning to the United States. Moreover, despite the lapse in induction authority prosecutions continue to burgeon. Only recently hundreds of men were indicted *en masse* in Buffalo and Rochester, New York, for alleged violations stemming from time periods both previous to and subsequent to this Court's decision in *Breen* and *Gutknecht*. See Memorandum for the United States in *Musser* v. *United States* and *Waldron* v. *United States*, Nos. 72-1733 and 72-6748, Oct. Term 1973, p. 6 n. 8, estimating a total of 10,500 registrants either under or awaiting indictment. See also Courier Express, 6/19/73 (Buffalo, New York), p. 1.

CONCLUSION

For all of the foregoing reasons certiorari should be granted and the decision below reversed.

Respectfully submitted,

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September 1973.

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* Attorneys for petitioner gratefully acknowledge the assistance of Mr. Edwin J. Oppenheimer, Legal Assistant, New York Civil Liberties Union.

Memorandum Opinion and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Cr. 153-72
154-72
194-72
195-72

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTONIO HERRERA CASTILLO, RAFAEL RODRIGUEZ ZALDO, FRANCISCO RAMOS BONILLA, LUIS MEDINA MERCADO,

Defendants.

These cases are presently consolidated for the purpose of deciding the common issue of law related to the defendants' motions to dismiss those counts which involve failure to report for induction into the armed forces of the United States. All the defendants herein are charged with failure to report for induction and for failure to report for physical examination. The Government concedes that the defendants were never submitted to physical examination pursuant to the Selective Service Act. The defendants contend that their being called to report for induction without their being physically and mentally declared fit for induction, constitutes a violation of the Selective Service Act.

The defendants concede that they may be indicted for failure to report and submit to a physical examination, but maintain that a successful completion of such an examination is a prerequisite to being called for induction.

The Government relies on the following Selective Service Regulation:

> "Section 1631.6 Action by local board upon receipt of allocation:
>
> . . . .
>
> Provided, That notwithstanding Part 1628 or any other provision of these regulations, when a registrant in whatever classification has refused or otherwise failed to comply with an order of his local board to report for and submit to an Armed Forces examination, he may after he is reclassified into Class 1-A or 1-A-O be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him and in such case the Armed Forces examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined." (32 CFR 1631.6).

Local Board Memorandum No. 106[1] is also relied on. It reads, in part, as follows:

> "Every Class 1-A or 1-A-O registrant who refuses or otherwise fails to report for and submit to an armed forces physical examination as ordered, shall be or-

[1] Issued on June 16, 1970 pursuant to an Executive Order of the same date.

dered to report for induction, provided he has not be ordered for induction until his or a higher random sequence number is reached for induction by his local board.

A registrant who has already failed to report for physical examination, and against whom no prosecution is pending for such failure, should be re-ordered for physical examination. If he again fails to comply he may be processed for induction under the provisions of amended 1631.7 of the regulations."

In *Gutknecht* v. *United States*, 396 US 295 (1969) a Selective Service registrant was declared "delinquent" pursuant to the then existing regulations for surrendering his registration certificate and classification notice, and ordered to report for induction. The Supreme Court ruled that the delinquency regulations under which petitioner was deprived of the order of call preference, to which he was entitled, were not authorized by the Selective Service Act.

The Government would have us limit the effects of that decision merely to cases in which the order of call is alter alleging that since the defendants were subject to the present lottery system, no violation of the *Gutknecht* doctrine is involved in this case. We feel that counsel reads *Gutknecht* rather restrictively.

That decision stands for the general proposition that Congress intended to punish registrants who failed to comply with their duties under the Act through the criminal sanctions contemplated in that law and not through using immediate induction as a disciplinary or inductive measure. This prohibition against special treatment of

"delinquents" is broad indeed and we feel covers the situation at bar. The Court stated at p. 306 as follows:

> "While Section 5(a)(1) provides that 'there shall be no discrimination against any person on account of race or color' (citations omitted) . . . there is no suggestion that as respects other types of discrimination the Selective Service has freewheeling authority to ride herd on the registrants using immediate induction as a disciplinary or vindictive measure."

The Court very clearly stated that the only punitive measures which the Board could take against a registrant were those criminal sanctions expressly contemplated in the Act. (See also: Breen v. Selective Service Board, 396 US 460 (1969) at p. 465-466.) The Court stated:

> "We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. Nor do we read it as granting personal privileges that may be forfeited for transgressions that affront the local board. If federal or state laws are violated by registrants, they can be prosecuted. If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed."

A registrant who fails to submit to a physical examination may be prosecuted under Section 462, 52 USC, for failure to report and submit to such an examination. The defendants here are charged with such an offense. The law, as we read it, authorizes no other sanctions, and much less an immediate order for induction.

The treatment accorded to the defendants in these cases differs from the treatment normally accorded other registrants before they are called for induction, namely, compliance with the applicable regulations. Section 1631.6, 21 CFR, clearly requires that a registrant first be found acceptable for service and that he be sent prior to being ordered to report for induction a statement of acceptability (DD Form 62).[2] The doing away with these two prerequisites in cases of registrants who have failed to report for a physical examination establishes acceleration of call as a matter of law.

The prior regulation involved in *Gutknecht* was voided in *United States* v. *Fox*, 454 F2d 593 (9 Cir., 1971), when applied to a situation identical to the case before us. In *Fox* the registrant was declared "delinquent" for failing to report for his physical examination and ordered to report for induction. While the present section 1631.6 does not declare the registrant a "delinquent", the effect is identical to what the Ninth Circuit Court of Appeals declared impermissible in *Fox*. The Court in that case, when faced with an attempt by the Government to prove that the registrant was not accelerated, decided that he was as a matter of law. The Court stated that without the declaration of delinquency the registrant could not have been ordered to report for induction since the Board

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[2] 1631.6 Action by local board upon receipt of allocation.

(a) When an allocation is received from the State Director of Selective Service, the Executive Secretary or clerk, if so authorized, or a local board member, shall select as provided herein, and issue orders to report for induction to those men required to fill the call from among its registrants who have been classified in Class 1-A or Class 1-A-O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed.

had not complied with the other prerequisites for induction which were that the registrant be classified 1-A or 1-A-O, be found acceptable for service in the Armed Forces, and have been mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction. These are the same prerequisites mentioned in the existing regulations in the present case. What the government could not do by naming the registrant a "delinquent" in *Fox* it cannot do here merely by failing to call him so. After all, "a rose is a rose, is a rose" no matter what you call it.

An identical result as that stated in *Fox, supra,* was also reached in *United States* v. *McClintock,* 311 F. Supp. 1119 (ND Cal., 1970); *United States* v. *Townsend,* 431 F2d 702 (9 Cir., 1970) and in *United States* v. *Stow,* 427 F2d 891 (9 Cir., 1970).

The importance of a prior determination of acceptability is plainly recognized by the law:

> "Section 454(a) . . . .
>
> No person shall be inducted into the Armed Forces for training and service . . . until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense." (50 USC 454(a).)

The applicable regulations (32 CFR 1631.6) attempt to cure the lack of a prior determination of acceptability when a registrant fails to report for a physical examination, and because of this is ordered to report for induction, by requiring that on reporting for induction such

registrant submit to the physical examination required by law.' This implicitly recognizes that the registrant has been ordered to report for induction without compliance with the acceptability prerequisite. The regulation clearly establishes that this is done when a registrant fails to report or submit to a physical examination. Ordering the registrant to report for induction without a prior determination of acceptability in this situation falls within the prohibition of *Gutknecht*, constituting an acceleration as a matter of law and a punitive measure because of his failure to report for a physical examination.

While we feel that the defendants' actions in refusing to report for their physical examinations is remonstrable, they can only be liable for the criminal sanctions the law provides and not for an accelerated order to report for induction. The Court in *Fox*[4] faced the same dilemma:

> "We realize that the result does not seem to be a desirable one; Fox was about as delinquent as it would be possible for a young man to be in relation to his various duties under the Selective Service Law. But we did not write the law or the regulations, and the defect in them that produces the result in this case has been corrected. As the Court pointed out in *Gutknecht*, there was a remedy: Fox could have been prosecuted for one or more of his numerous delinquencies. But that was not done; instead, the delinquency route to accelerated induction, condemned in *Gutknecht*, was taken."

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[3] ". . . and in such case the armed forces examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined." (32 CFR 1631.6(a)).

[4] *Supra*, at pp. 595-596.

Contrary to *Fox*, where the defendant was indicted only for failure to report for induction, the defendants in these cases are also indicted for failure to report for physical examinations, which charges we need not dismiss.

It is therefore ORDERED that Counts One in Criminal cases 153-72, 154-72, 194-72 and 195-72 are hereby dismissed.

It is so ordered.

San Juan, Puerto Rico, March 23, 1973.

HIRAM R. CANCIO
Chief U. S. District Judge

[March 23, 1973]

FILED
DEC 27 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

There are three opinions of the Court of Appeals, *United States* v. *Davis*, 432 F.2d 1009 (9th Cir. 1970) (*Davis I*) (Appendix to Certiorari Petition, page 1a[1]); *United States* v. *Davis*, 447 F.2d 1376 (9th Cir. 1971) (*Davis II*) (11a); *United States* v. *Davis*, 472 F.2d 596 (9th Cir. 1972) (*Davis III*) (18a-19a).

Subsequent to *Davis I* a hearing on remand was held in the United States District Court for the Central District of California. The oral findings of the district court after remand are not reported and are set forth in the petition

[1] In accordance with Memorandum re Printing received from the office of the Clerk, opinions and findings by courts below which have been included in printed petition for *certiorari* are not included in Single Appendix. Such references to material included in petition for *certiorari* will hereinafter be indicated by page number in appendix to petition for *certiorari*, i.e., "1a."

for *certiorari* at 2a-6a. The district court's findings of fact and conclusions of law after remand are not reported and are set forth in the petition for *certiorari* at 7a-10a. The order of the Court of Appeals denying rehearing, and denying the suggestion for rehearing *en banc,* subsequent to its opinion in *Davis II,* is unreported and is set forth at 12a. The order of this Court denying *certiorari* to review *Davis II* is reported at 405 U.S. 933 and is set forth at 13a. The order of the Court of Appeals denying petitioner's motion for leave to file an out of time petition for rehearing, with the suggestion for rehearing *en banc,* following this Court's denial of *certiorari* in *Davis II,* is unreported and is set forth at 14a. The order of the district court denying petitioner's motion pursuant to 28 U.S.C. §2255 is unreported and is set forth at 15a-17a.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming the denial of relief under 28 U.S.C. §2255 (*Davis III*) (18a-19a), was entered on December 26, 1972. On March 21, 1973, Mr. Justice Douglas signed an order extending the time to file a petition for *certiorari* up to and including April 25, 1973. The petition for *certiorari* was filed on April 25, 1973, and was granted on November 5, 1973. On December 12, 1973, the Clerk of this Court extended petitioner's time to file the brief on the merits up to and including December 27, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Court of Appeals erred in holding that a change in the law which occurred after appellate affirmance of petitioner's conviction, and while *certiorari* was pending in this Court, could not be considered in a post-conviction proceeding brought under 28 U.S.C. §2255.

2. Whether the decision of the Court of Appeals in *United States* v. *Fox,* 454 F.2d 593, constitutes a change in the law which must be retroactively applied and requires the vacating of petitioner's conviction pursuant to 28 U.S.C. §2255.

3. Whether the decisions below, which validate a conviction for induction refusal, are predicated on an illegal delinquency-based induction order in conflict with the decision of this Court in *Gutknecht* v. *United States,* 396 U.S. 295 (1970).

4. Whether the decision of the Court of Appeals in *United States* v. *Fox, supra,* correctly expresses the principles enunciated by this Court in *Gutknecht* v. *United States, supra,* and should be adopted by this Court.

Constitutional Provisions, Statutes and Regulations

This case involves the Fifth Amendment to the Constitution of the United States; Chapter 153 of Title 28, United States Code (28 U.S.C. §2255); the Military Selective Service Act of 1967 (50 U.S.C. App. §451 *et seq.*); 32 C.F.R. 1602.4 (1967); 32 C.F.R. Part 1642 (1967); 32 C.F.R. 1631.7 (a) (1967); and 1631.7(a) (1970).

The pertinent texts of these provisions are as follows:

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maxi-

mum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it ap-

pears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Section 5(a)(1), Military Selective Service Act of 1967, 50 U.S.C. App. §455(a)(1)

The selection of persons for training and service under section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted. . . .

32 C.F.R. §1602.4 Delinquent.

A "delinquent" is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.

32 C.F.R. §1642.4 Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the

date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

. . .

32 C.F.R. §1631.7 (1967) Action by local board upon receipt of notice of call.

(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: *Provided,* That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form No. 62): *And provided further,* That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for in-

duction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form No. 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

. . .

32 C.F.R. §1631.7 (1970)

(a) When a call is received by a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, or for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, the Executive Secretary or clerk, if so authorized, or a local board member shall select, as provided herein, and issue orders to report for induction to the number of men required to fill the call from among its registrants who have been classified in Class I–A or Class I–A–O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed at least 21 days before the date fixed for induction: *Provided,* That notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I–A or Class I–A–O

has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined: *Provided further,* That a registrant classified in Class I–A or Class I–A–O who has volunteered for induction may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. . . .

Statement of the Case

Petitioner registered with Selective Service Local Board No. 101, Los Angeles, California, on October 4, 1963 (8a). On February 3, 1965, he was classified I-A. On February 16, 1965, he was ordered to report for an Armed Forces physical examination on March 4, 1965 (A12).[2] On the appointed day, petitioner failed to report but subsequently contacted the local board and explained that his failure to report was due to illness (SSF 28).[3] On September 19,

[2] "A" references refer to the Appendix to the briefs ("Single Appendix"), separately printed and filed pursuant to Rule 36.

[3] "SSF" references refer to petitioner's paginated Selective Service File, Government's Exhibit 1 in the trial court.

1965, petitioner was ordered to report for a pre-induction physical examination on October 8, 1965 (A12, SSF 30). The order was mailed to a post office box address in Los Angeles supplied to the local board by petitioner. On September 22, 1965, the order was returned to the local board, stamped, "Addressee Unknown" (SSF 31). Petitioner did not report for his pre-induction physical on October 8, 1965. Subsequently, on December 6, 1965, petitioner was mailed a California Selective Service Form 304, "Delinquency Warning" (A13, SSF 32), which notified petitioner that his local board was "considering declaring you to be delinquent . . ." and further that,

> "A delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants . . . any further noncompliance on your part could result in your immediate induction" (A13, SSF 32).

This notice was mailed to the same Los Angeles post office box as the previous physical examination orders had been mailed to. In addition, the "Delinquency Warning" was mailed to another Los Angeles address, "3781¼, Menlo." The "warnings" were received back at the local board on December 15, 1965, and April 14, 1966, respectively, stamped, "Unknown" (SSF 33-35). Thereafter, on May 4, 1966, petitioner's local board declared him to be a delinquent pursuant to 32 C.F.R. Part 1642, et seq., and mailed him a Delinquency Notice, SSS Form 304 (A14) at the "Menlo" address. On the same day, petitioner appeared at the local board and completed a Current Information Questionnaire, again giving the "Menlo" address as his

current mailing address (SSF 41). Thereafter, on February 21, 1967, petitioner was ordered to report for induction (A15). On the face of the induction order was typed the word "Delinquent" (A15). Mailed to the "Menlo" address, the order was returned to the local board undelivered on February 23, 1967 (SSF 44).

On the day set for his induction, March 7, 1967, petitioner did not report (A12). His selective service file was subsequently forwarded to the California State Headquarters of Selective Service for review. It was then returned to the local board with instructions from the State Director to reorder petitioner for induction by mailing such an order to a third address in St. Paul, Minnesota, previously supplied to the local board by petitioner (SSF 46). On June 20, 1967, an order to report for induction on July 11, 1967 was mailed to petitioner at his Minnesota address. As did the previous induction order, the order of June 20th had the word "Delinquent" typed on the face (A16). The Minutes of Action (A12), also reflect that petitioner was ordered "as Del [*sic*]." On July 11, 1967, petitioner failed to report for induction.

Proceedings Below

Petitioner was originally tried to a jury and convicted of having failed to report for induction on the July 11, 1967, date. On appeal, the Ninth Circuit remanded without limitation of scope but especially for consideration of the case in light of . . . Gutknecht v. United States . . ." 432 F.2d at 1010 (*Davis I*) (1a). On remand the district court, Hauk, D.J., found:

"... 21 others were younger than [petitioner and] were called up either before or at the same time he was on the order of call, and to me that means that there was no acceleration. Now, turning to the second issue. Even if there were acceleration in a technical sense, that is not acceleration out and beyond and different from his proper date of birth order of call, even if there could be considered some technical acceleration in that he may have been called up as a delinquent when he might not have been called up as a non-delinquent at that particular moment, even though it would be within the proper order of call at that time which was based upon oldest men going up first, or being called up first, even if there were this technical acceleration, still I do not find this so-called affectation or prejudicial affection of substantial rights, or prejudice to substantial rights of the Defendant Davis that in my view the cases in the Ninth Circuit and cases elsewhere, including Gutknecht, require as a part of acceleration in order to hold that a defendant should not have been convicted or should not be convicted for violation of the order for induction" (3a-4a).

Judge Hauk went on to hold that:

"... even though he didn't take his physical examination, and there was no statement of acceptability, that is not required, as I see it, under 1631.7, a regulation which has not been outlawed or declared unconstitutional or illegal by Gutknecht, and which provides that one who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable

for service in the Armed Forces, and regardless of whether or not a statement of acceptability, DD62, has been mailed to him. And what is a delinquent as defined in 1602.4 of 32 Code of Federal Regulations is a person required to be registered under the Selective Service law who fails or neglects to perform any duty required by him under the terms of the Selective Service Law, and this 1602.4 has not been outlawed either by Gutknecht" (4a).[4]

On the second appeal, the Ninth Circuit, in a short per curiam handed down on August 12, 1971, affirmed the conviction, finding no "acceleration" within the meaning of *Gutknecht* v. *United States,* 396 U.S. 295 (1970). 447 F.2d 1376 (*Davis II*). In addition, the court ruled, without explanation, that the plainly conflicting opinion of the Fourth Circuit in *United States* v. *Dobie,* 444 F.2d 417 (1971) was "distinguishable" (11a). See Point II, *infra,* pp. 47-48.

A petition for rehearing with a suggestion for rehearing *en banc* was denied on September 13, 1971 (12a).

On November 12, 1971, a petition for certiorari, No. 71-661, was filed.

In response to the petition for certiorari, the Solicitor General in his initial Memorandum for the United States in Opposition, conceded at page 7 thereof,

"that regulations applicable when [petitioner] was ordered to report permitted local boards to issue in-

[4] In support of these contentions, the district court relied substantially on the reasoning of the opinion in *United States* v. *Crocker,* 313 F. Supp. 831 (D. Minn. 1970) (5a-6a), which opinion, we respectfully submit, is totally in error. See Point II, *infra,* pp. 38-46.

duction orders to delinquents without a prior pre-induction-physical and statement of acceptability, and that [petitioner] received his order pursuant to those regulations."

Following the filing of the petition for certiorari and the Solicitor General's Memorandum In Opposition, the court below, on December 30, 1971, decided the cases of *United States* v. *Fox*, 454 F.2d 593, and *Zack* v. *Benson*, 454 F.2d 596. These decisions held that registrants like petitioner who had been ordered to report for induction as delinquents pursuant to 32 C.F.R. 1631.7(b), and whose delinquency status had stemmed from the failure to report for a pre-induction physical examination, were illegally ordered for induction as a matter of law under this Court's decision in *Gutknecht* v. *United States, supra.*

These cases were brought to the attention of this Court by way of a Supplemental Memorandum. The Solicitor General, in response, filed his own Supplemental Memorandum For the United States In Opposition. At page 2 thereof, it was conceded that

"the holdings in *Fox* and in the present case are inconsistent . . ."[5]

Nevertheless, he urged this Court to deny certiorari on the theory that,

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[5] The statement by the panel sitting in *Fox, supra,* that "the nature of the delinquency" did not appear in petitioner's case, 454 F.2d at 594, was, with all due respect, plainly erroneous. The record in this case clearly discloses, and the government acknowledged both before this Court and before the Ninth Circuit in its unsuccessful Petition for Rehearing in *Fox,* at page 11 thereof, that the basis for petitioner's delinquency was identical to Fox's—failure to report for a physical examination.

"the conflict is an intra-circuit one and presumably will be resolved by the Ninth Circuit itself . . ." *Id.*

Thereafter, certiorari was denied on February 22, 1972, 405 U.S. 993 (13a). In light of the Solicitor General's suggestion that the conflict between *Fox, supra,* and petitioner's case be resolved by the Ninth Circuit itself, the denial of certiorari seemed understandable. See *United States ex rel. Robinson* v. *Johnston,* 316 U.S. 649 (1942); *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

Accordingly, a motion for an extension of time in which to file an out of time petition for rehearing with a suggestion for rehearing *en banc,* accompanied by the petition for rehearing with suggestion for rehearing *en banc,* was tendered to the Court below on April 19, 1972. The petition requested the Court to resolve the concededly existing conflict between the opinions in *Davis II,* 447 F.2d 1376, and in *Fox,* 454 F.2d 593.*

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* It is difficult to imagine a case which could more clearly have warranted *en banc* reconsideration than petitioner's; especially in view of the government's own attempts to secure a rehearing in *Fox.* Indeed, the panel which wrote the opinion below appeared to have recognized the desirability for such an *en banc* determination of petitioner's case. See *Davis III* at n. 1 (19a).

Further, neither the passage of time, *Huddelston* v. *Dwyer,* 322 U.S. 232 (1944), nor the prior denial of certiorari, *Braniff Airways Inc.* v. *Curtiss-Wright Corp.,* 424 F.2d 427, 429-430 (2d Cir. 1970); *Meehan* v. *Macy,* 425 F.2d 469 (D.C. Cir. 1968), was a bar to rehearing *en banc* at that time. Cf. *Davis* v. *Balkcom,* 369 U.S. 811 (1962). See also, Stern and Gressman, SUPREME COURT PRACTICE 213-215 (1969). The petition, under Ninth Circuit law, could also have been properly construed as a timely motion to recall the mandate. *Munoz and Tigar* v. *United States District Court for the Central District of California,* 446 F.2d 434, 436 (9th Cir. 1971).

On May 22, 1972, however, the Ninth Circuit denied the motion and returned the petition for rehearing to petitioner's counsel (14a).

Thereafter, on June 5, 1972, the District Court spread on the record the judgment of this Court denying certiorari and remanded petitioner to custody[7] to begin serving his sentence of three years imprisonment. At the same time, petitioner's motion seeking relief under 28 U.S.C. §2255 was forthwith denied (16a). Motions made for bail pending an appeal of the denial of the §2255 motion as well as a motion under F.R. Cr. P. 35 for reduction or modification of sentence were taken under advisement. The Rule 35 motion was thereafter granted by the district court in part (A3), and petitioner was subsequently released from incarceration after having served a total of four months of his three year term, and he was ordered placed on probation for the remainder.

An appeal to the Ninth Circuit from the summary denial of relief under 28 U.S.C. §2255 followed and it is from that decision, affirming the denial of post-conviction relief, 472 F.2d 596 (*Davis III*) (18a), for which certiorari was sought, and granted on November 5, 1973.

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[7] Petitioner had been at large on $10,000.00 bail pursuant to orders of Mr. Justice Douglas dated November 27, 1971 and January 8, 1972 (A2).

Summary of Argument

I.

A change in Ninth Circuit law occurred between *Davis II*, the affirmance of petitioner's conviction for induction refusal on direct appeal, and *Davis III*, where the court below affirmed the decision of the district court denying post-conviction relief pursuant to 28 U.S.C. §2255. In *Davis II*, the Ninth Circuit held that petitioner's conviction could stand, notwithstanding his induction pursuant to Selective Service delinquency regulations, because of the district court's finding that petitioner's induction was not accelerated as a matter of fact. Subsequent to *Davis II*, the Ninth Circuit held in *United States* v. *Fox*, 454 F.2d 593 (1971), that an induction order based on a declaration of delinquency following a failure to appear at a physical examination was invalid *per se*, and such *per se* invalidity made it unnecessary to consider whether or not petitioner's induction was accelerated in fact. This obvious change in law has been acknowledged by the Solicitor General, yet the Ninth Circuit inexplicably refused to honor it.

This Court's decisions in *Kaufman* v. *United States*, 394 U.S. 217 (1969), and *Sanders* v. *United States*, 373 U.S. 1 (1963), are solid authority that §2255 relief is available in this case. Various courts of appeals, interpreting *Kaufman* and *Sanders*, have vacated judgments of conviction based on intervening changes in law. The distinctions between *Kaufman* and *Sanders* and this case suggested by the Solicitor General are inapplicable and without merit. An intervening change in law which occurs post-appellate affirmance of conviction is a particularly appropriate occasion for relief under 28 U.S.C. §2255.

Moreover, where the intervening change in law must be retroactively applied, as is the case with the *Gutknecht* doctrine, post-conviction relief is compelled. See *Robinson* v. *Neil*, —— U.S. ——, 35 L.Ed.2d 29 (1973).

The denial of §2255 relief in this case is in any event contrary to the ends of justice. None of the considerations

suggested by various Justices of the Court for limiting post-conviction relief are applicable here.

II.

The various Selective Service delinquency regulations in effect at the time of petitioner's conviction purported to authorize Selective Service local boards to impose three species of sanctions against Selective Service registrants whom boards found to be delinquent in complying with their obligations under the Selective Service laws and regulations: (1) change of classification from a deferred or exempt classification to I-A; (2) accelerated induction rather than induction in accordance with normal order of call regulations; and (3) induction without a prior pre-induction physical examination and the issuance of a statement of acceptability following such pre-induction physical examination. This Court in *Gutknecht* v. *United States*, 396 U.S. 295 (1970) and related cases held that the delinquency regulations had never been authorized by Congress and were beyond the powers conferred by Congress on the President, thereby necessarily implicating constitutional rights under the Fifth Amendment. These holdings were in the context of the first two species of delinquency sanctions, and this Court has not yet had occasion to rule on the third species of delinquency sanction, induction without a pre-induction physical examination and a statement of acceptability. However, the Court of Appeals for the Ninth Circuit in *United States* v. *Fox, supra,* has so ruled, holding that this Court's decision in *Gutknecht* v. *United States, supra,* compelled the invalidation of former 32 C.F.R. §1631.7 (1967), the regulation which provided for the third species of delinquency sanction. The court below erred in not applying the *Gutknecht-Fox* rationale in *Davis III,* particularly since *Gutknecht* must be retroactively applied, and the Ninth Circuit has in fact applied *Fox* retroactively in *Zack* v. *Benson,* 454 F.2d 596 (9th Cir. 1971).

I.

An intervening change in the law which would require petitioner's acquittal having occurred after affirmance of petitioner's conviction, and while certiorari was pending, the Court below erred in denying post-conviction relief under 28 U.S.C. §2255.

1. ***Although the Ninth Circuit panel which decided* Davis III *inexplicably refused to acknowledge the change, the Ninth Circuit's decision in* United States v. Fox, *454 F.2d 593 (1971), unmistakably effected a change in the law, which, had it existed at the time of* Davis II, *would have resulted in petitioner's acquittal.***

Petitioner's conviction was affirmed by the District Court (10a) and by the Ninth Circuit in *Davis II* (11a) on the grounds that his induction had not been "accelerated" in fact (9a), notwithstanding the finding that he had been declared delinquent for failure to report for a physical examination, and been ordered to report for induction as a delinquent, without the required physical examination and statement of acceptability (8a). Thus the *Davis II* panel appeared to follow a rule that in such cases, the validity of the induction order would depend on a case by case determination of acceleration in fact.

United States v. *Fox, supra,* on the other hand, ruled that a delinquency-based induction order, where the delinquency badge was affixed because of a failure to appear at a physical examination, is invalid *per se,* and no factual inquiry is necessary. It specifically ruled that former 32 C.F.R. §1631.7 (1967), which purported to authorize delinquency induction without a physical examination, was

invalid under the doctrine of *Gutknecht* v. *United States*, 396 U.S. 295 (1970). See discussion in Point II, *infra*, pp. 38 *et seq.*

This change in law is acknowledged by the Solicitor General (Memo in Opp., page 2). It was acknowledged by the United States Attorney for the Central District of California, who won *Davis* for the government, and lost *Fox*. See *United States* v. *Fox, supra*, Government's Petition for Rehearing, page 11. Moreover, the only Ninth Circuit decision which cites *Fox*, other than *Davis III*, recognizes the change wrought by *Fox*. See *United States* v. *Ossa*, 470 F.2d 816, 818-819 (1972).[8]

That a change in law occurred from *Davis II* to *Fox* is no more than a common sense observation. Two Selective Service registrants, each charged with an identical offense, in the same district, and each presenting the same defense, have had legal results as widely disparate as the criminal law knows: Davis went to jail, and Fox went free.[9] See also *Zack* v. *Benson*, 454 F.2d 596 (9th Cir. 1971). Regardless of what consequences may flow from this change, it simply boggles the mind to suggest or imply that a change has not occurred.

It is indeed true that the court below wrote in its cryptic *per curiam*, 472 F.2d at 596 (19a), "... that *Fox* does not

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[8] That *Fox* is now the rule in the Ninth Circuit has been noted by judges in other districts. See *United States* v. *Gross*, 340 F. Supp. 1337, 1338, n. 1 (S.D.N.Y. 1972); *United States* v. *Castillo*, —— F. Supp. ——, 72 Cr. 153 (D.P.R. March 23, 1973) (Petitioner's Reply Brief, p. 5a). See also *United States* v. *Malone*, 336 F. Supp. 1324, 1329 (N.D. Cal. 1972).

[9] Cf. *Fay* v. *Noia*, 372 U.S. 391, 441 (1963), where this Court held that Federal habeas corpus relief was required to redress the disparate treatment of co-defendants who had been convicted of murder.

even suggest overruling *Davis* . . . ", and added in a footnote, without benefit of citation, "For that matter, an in banc proceeding would be required to overrule a previous panel decision." But it is elementary that "new law" or "change in law", whatever it means, is certainly not confined to the formal overruling by a Court of Appeals of its own prior decision.[10] Indeed, the Ninth Circuit itself has recognized that §2255 petitions premised on changes in law will be entertained where there are intervening decisions which do not flatly overrule prior law, but "which have a direct and substantial bearing . . . " upon the issues raised. *Vanhook* v. *Craven,* 419 F.2d 1295, 1296 (9th Cir. 1969).

The judges who sat on the panel of *Davis III* may have been as unimpressed with petitioner's Selective Service history as were the judges on the panel in *Fox.* See 454 F.2d at 595-596. But whatever their reasons for refusing to give petitioner the benefit of the new law created by *United States* v. *Fox,* it is, we respectfully suggest, an inexcusable exercise in judicial blindfoldedness to refuse to recognize that a change has occurred.[11]

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[10] It is significant that the Court below in its *per curiam* does not state that *Fox* is not new law. It is content with the implication that *Fox* does not "overrule" *Davis* (19a).

[11] It is apparently the rule in the Ninth Circuit that the most recent decision of a panel "is binding upon all other panels of the court." *United States* v. *Jenson,* 450 F.2d 1258, 1264 (9th Cir. 1971). See *Etcheverry* v. *United States,* 320 F.2d 873, 874 (1963).

2. *The decisions of this Court in* Kaufman v. United States, *394 U.S. 217 (1969), and* Sanders v. United States, *373 U.S. 1 (1963), expressly authorize post-conviction relief where there has been an intervening change in the law, after appellate affirmance of a conviction.*

The government does not appear to contest the proposition that at least under some circumstances §2255 authorizes review of a post-appellate affirmance change in the law. Indeed, it has conceded that whether or not the *Fox* decision must be considered "new law" "is unclear" (Memo in Opp., page 5). The government has cited no authority in support of a doctrine which would preclude *Fox* from being considered "new law" under *Kaufman* and *Sanders*.

Petitioner urges, on the contrary, that *Kaufman* and *Sanders*, as explicated and applied by virtually every court of appeals which has ruled on the question, compel a determination that §2255 relief is available in this case. *Sanders* v. *United States, supra,* was the occasion where this Court expressly set out to consider and determine "the standards which should guide a federal court in deciding whether to grant a hearing on a motion of a federal prisoner under 28 U.S.C. §2255." 373 U.S. at 2. The case arose in the context of a second §2255 application where a prior application had been denied. Nevertheless, in systematically considering and determining the occasions where "Successive Motions on Grounds Previously Heard and Determined," 373 U.S. at 15, should be considered, the Court provided guidelines which are obviously no less applicable in the case of an initial motion for §2255 relief such as in this case. It is respectfully submitted that Mr. Justice Brennan's opinion, for the Court, sets forth the

rationale which should have compelled the courts below to grant petitioner's application:

> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in Townsend v. Sain, supra, and that discussion need not be repeated here. *If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law* or some other justification for having failed to raise a crucial point or argument in the prior application. Two further points should be noted. *First,* the foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized. *Second,* the burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground." 373 U.S. at 16-17 (emphasis added).

Six years later, this Court in *Kaufman* v. *United States, supra,* reiterated that an intervening change in law was an appropriate basis for post-conviction relief, this time in the context of an initial application for Federal post-conviction relief. The Court's opinion expressly adopted in its entirety Judge Wright's dissent in *Thornton* v. *United States,* 368 F.2d 822, 831 (D.C. Cir. 1966):

"Federal prisoners applying for collateral relief often have had their constitutional claims passed on by federal courts at trial or on appeal, so the Brown v. Allen rationale for federal court relitigation is inapposite. But this difference provides no basis for limiting the grounds upon which federal prisoners may obtain collateral relief, or for formulating a separate set of rules to determine when a federal prisoner's claim has adequately been adjudicated. Where a federal trial or appellate court has a 'say' on a federal prisoner's claim, there may be no need for collateral relitigation. But what if the federal trial or appellate court said nothing because the issue was not raised? What if it is unclear whether the 'say' was on the merits? *What if new law has been made* or facts uncovered relating to the constitutional claim since the trial and appeal? What if the trial or appellate court based its rulings on findings of fact made after a hearing not 'full and fair' within the meaning of Townsend v. Sain, 372 US 293 [9 L Ed 2d 770, 83 S Ct 745] (1963)? All these problems are common to state and federal prisoners, and the interest in finality operates equally in both situations. These problems raise, not the issue whether relitigation is necessary, but whether one adequate litigation has been afforded. It would be anomalous indeed, especially in light of the interest in maintaining good federal-state relations, if defaults not precluding one adequate federal review for the constitutional claims of state prisoners precluded such a review for federal prisoners, or if defects rendering state court adjudications inadequate did not similarly affect federal court adjudications." 394 U.S. at 230 (emphasis added).

The government nevertheless argues that Judge Wright's formulation, although adopted *in haec verba* by *Kaufman*, is dicta, and that neither *Kaufman* nor *Sanders* is in point. (Memo in Opp., page 5.) It is, of course, always possible for an advocate to attempt to so refine and distinguish a holding to its narrowest point so that an argument of inapplicability can be mustered. That the distinctions proffered by the government are the proverbial distinctions without differences is set forth later in our argument, see *infra*, pp. 28-31. It is not, however, necessary for petitioner to break new ground by demonstrating the lack of merit in the government's distinctions in order to elucidate a doctrine which compels relief for petitioner, since several courts of appeals have already done so.

In *Tucker* v. *United States*, 427 F.2d 615 (D.C. Cir. 1970), the Court of Appeals, citing *Kaufman* and *Sanders*, reversed a District Court denial of post-conviction relief (several prior applications having been denied), where the pending application made several claims. The court pointed out:

> "... at least one of appellant's claims rests upon an intervening change in the law, which would entitle him to a new hearing even if the merits had been determined adversely to him prior to that time." 427 F.2d at 617-618 (footnotes omitted).

In accord is the decision of the Fourth Circuit in *Alford* v. *North Carolina*, 405 F.2d 340 (1969). A state prisoner sought federal habeas corpus relief[12] after appellate af-

[12] It is, of course, well-settled that the scope of post-conviction habeas corpus relief available to a state prisoner is identical to

firmance of his conviction, based on this Court's decision in *United States* v. *Jackson*, 390 U.S. 570 (1968). The State of North Carolina opposed post-conviction relief since "the grounds asserted to support the petition have been previously decided on the merits . . ." 405 F.2d at 342. Applying *Sanders*, the Fourth Circuit rejected this argument because ". . . the instant appeal deals primarily not with new factual allegations but, rather, with what is admittedly a new question of law, namely, the applicability and effect of the Supreme Court's recent decision in the *Jackson* case." *Ibid.*[13]

To the same effect is *Gray* v. *United States*, 407 F.2d 831 (5th Cir. 1969), which held that post-conviction relief under §2255 was available based on intervening decisions of this Court. Anticipating and rejecting any suggestion that considerations of finality should bar relief, Chief Judge Brown wrote:

> "Time and tide which wait for no man and the congenital delay of adjudication are often deplored. Here delay and time have wrought a great boon to appellant." 407 F.2d at 831.[14]

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that available to a federal prisoner under 28 U.S.C. §2255. See *Kaufman* v. *United States*, *supra*, 394 U.S. at 221-222; *Sanders* v. *United States*, *supra*, 373 U.S. at 13-14; *Hill* v. *United States*, 368 U.S. 424, 427 (1962).

[13] Although the Supreme Court reversed on other grounds, 400 U.S. 25 (1970), none of the justices in either the majority or the minority (nor Chief Judge Haynsworth, who dissented in *Alford*, 405 F.2d at 349), raised any questions concerning the propriety of the Court of Appeals and of the Supreme Court considering the intervening question of law in a post-conviction proceeding.

[14] See also *Ramos* v. *United States*, 319 F. Supp. 1207, 1209 (D. R.I. 1970); *United States* v. *Langford*, 315 F. Supp. 472 (D. Minn. 1970); *Isaac* v. *United States*, 293 F. Supp. 1096 (D.S.C. 1968).

Moreover, the Ninth Circuit itself has rejected considerations similar to that raised by the government and, on the authority of *Sanders*, held that an application for post-conviction relief must be entertained where "subsequent to this court's [the Ninth Circuit's] affirmance of the district court's rejection of his first petition, the Supreme Court of the United States rendered a number of decisions which have a direct and substantial bearing upon the constitutional issues underlying his claim. . . . In these circumstances, 'the ends of justice would be served by permitting the redetermination of the ground' in a new petition." *Vanhook* v. *Craven*, 419 F.2d 1295, 1296 (9th Cir. 1969). See also *Jack* v. *United States*, 435 F.2d 317, 319 (9th Cir. 1970) ("The fact that the legal claim has been determined in an appellate proceeding by this court is not necessarily determinative in a section 2255 proceeding").

In the face of this solid body of law from this Court and from various courts of appeals, including itself, the decision below denying §2255 relief because the issues tendered by petitioner were "precisely the same as the ones presented and decided adversely to appellant in *United States* v. *Davis*" [*Davis II*] (19a), is simply inexplicable, and with respect, entirely incorrect. No effort was made by the Court below to explain its holding, or to interpret *Kaufman* and *Sanders*. There is only the cryptic statement that "the decision on the direct appeal is the law of the case. Odom v. United States, 455 F.2d 159, 160 (C.A. 9 1972)" (19a).

Odom v. *United States, supra*, offers no more enlightenment as to why §2255 relief is not available in this case than does *Davis III*. However, two Ninth Circuit decisions cited in *Odom* suggest that the Court below might have

been relying upon them for the proposition "that when a matter has been decided adversely on an appeal from a conviction, it cannot be litigated again on a 2255 motion." *Odom* v. *United States*, 455 F.2d at 160.[15] The prior decisions cited in *Odom*, *Stein* v. *United States*, 390 F.2d 625 (1968), which is pre-*Kaufman*, and *Fiano* v. *United States*, 291 F.2d 113 (1961), which is pre-*Kaufman* and pre-*Sanders*, assuming that they support *Odom*, are equally incorrect. The only possible way to explain *Odom* is not in terms of unavailability of §2255 relief where there is an intervening change in law, but only by recognizing that there was *no* intervening change in law. In fact, the *Odom* petitioner sought to take advantage of the new insanity rule announced by the Ninth Circuit in *Wade* v. *United States*, 426 F.2d 64 (9th Cir. 1970), which, although it was decided only six days after the Ninth Circuit's affirmance of Odom's conviction, anticipated possible post-conviction applications in other cases, and expressly pretermitted such applications by holding that *Wade* would not be retroactively applied. 455 F.2d at 160.

In its unsuccessful attempt to oppose *certiorari* in this case, the government suggested three distinctions between the *Sanders-Kaufman* doctrine and this case. (Memo in Opp., pp. 5-6.) None of them is of any merit.

(1) It is pointed out that in neither *Sanders* nor *Kaufman* was the issue on which §2255 relief was sought raised on direct appeal. Indeed, in *Kaufman* it was a new ques-

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[15] Neither *Odom*, nor *Davis III*, makes any effort to reconcile this statement with the contrary prior holding two years earlier in *Jack* v. *United States*, *supra*: "The fact that the legal claim has been determined in an appellate proceeding by this court is not necessarily determinative in a section 2255 proceeding." 435 F.2d at 319.

tion of unlawful search and seizure which petitioner had not raised on direct appeal, and in *Sanders*, where there was a guilty plea, the issue could have been previously raised, but on a prior §2255 application rather than on direct appeal. These are distinctions without differences.

Kaufman, by adopting Judge Wright's dissent in *Thornton, supra*, states flatly that an intervening change in the law *is* a fit subject for §2255.[16] As the Harvard Law Review observed in its extensive review of Federal Habeas Corpus, "... the fact that an appellant seeks to raise in collateral proceedings a claim previously reviewed on appeal should not be a bar to relief when there has been a change of law ... since the appeal." 83 HARV. L. REV. 1040, 1065-1066, n. 144 (1970).

And nothing in *Sanders*, which allows a second post-conviction application under certain circumstances, necessarily precludes a *first* application merely because the same ground was determined adversely on the direct appeal. Indeed, the essence of *Sanders* is that considerations of finality cannot bar even a series of §2255 applications if in fact the petitioner ultimately raises a valid point. *Sanders, supra*, 373 U.S. at 8-9. And if a §2255 petitioner is not to be barred from having a claim considered if it could have been raised previously but was not, it would follow *a fortiori* that the petitioner is not to be barred when he raised the question previously as best he could, but was denied relief only because of the prior state of the law, which has since changed to his advantage.

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[16] This may indeed be dicta, see Memo in Opp., p. 5, n. 3, but *Kaufman's* rationale offers no basis for suggesting that petitioner should have the benefit of newly discovered facts, but should not have the benefit of newly declared law.

Limiting *Sanders* to allowing successive §2255 applications if the issue had not been raised on direct appeal, but barring any and all §2255 applications if the issue had been unsuccessfully raised on appeal, would produce the anomalous result of discouraging the utilization of the direct appellate process, the very evil against which courts considering post-conviction applications have traditionally and continuously warned. See "Federal Habeas Corpus," 83 HARV. L. REV. 1040, 1041 (1970). Indeed, *Sunal* v. *Large*, 332 U.S. 174 (1946), looms as an admonition against abandoning even an appeal which appears to be futile under the existing state of the law, lest the consequence be the denial of post-conviction relief when the unexpected change in the law does in fact occur. *Sunal* points out that had the habeas corpus petitioners there "pursued the appellate course and failed, their cases would be quite different." 332 U.S. at 181.[17]

(2) The second distinction suggested by the government is that *Sanders* authorizes §2255 consideration only of a new "ground" for relief, but not of a new "argument"

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[17] If petitioner, thinking that an appeal would be futile would have elected not to appeal, the government would certainly argue that he should be barred from relief under *Sunal* v. *Large*, *supra*. But see "Federal Habeas Corpus," 83 Harv. L. Rev. 1040, 1069-1070, note 167 (1970): "Instances in which there has been a change of law after the time for further appeal has lapsed present a particularly persuasive argument for opening the collateral jurisdiction to errors of law. . . . [I]t seems questionable whether such a strict rule of waiver [referring to *Sunal* v. *Large*] would be applied today." See *Zack* v. *Benson*, 454 F.2d 596 (9th Cir. 1971), discussed *infra*, p. 35. On the other hand, the government is now arguing that petitioner should be denied relief precisely because he sought to do that which *Sunal* v. *Large* says he would be penalized for not doing. Any result other than one which allows relief to petitioner would cage a federal defendant in the Kafkaesque dilemma where he is damned if he does and damned if he does not.

relating to the same ground. *Sanders* does indeed suggest such a distinction, 373 U.S. at 17, but at the same time it makes clear that a "purely legal" question, such as "an intervening change in the law" is a new "ground" rather than simply a new "argument" concerning an old ground. Indeed, the very point at issue in this case can hardly be considered a "new argument." It is not as if petitioner has been stimulated by a new decision to make a new argument. The opposite is true. Petitioner and his counsel have consistently made this argument at every level of this case, but it has only become a new ground for relief since the intervening change in the law created by the *Fox* case.

(3) Nor is the third suggested distinction, between a constitutional and a non-constitutional claim, any more persuasive. If *Davis II* is incorrect, and if *Fox* is correct, as petitioner contends, then he has been invalidly and unjustly convicted on the basis of a delinquency status which was never authorized by Congress, and which resulted in his deprivation of liberty without due process of law. It is too late in the day to assert that *Gutknecht* v. *United States*, 396 U.S. 295 (1970), is not a constitutional holding,[18] and the decision in *Fox, supra,* is no more than the application of *Gutknecht's* constitutional holding to the species of delinquency processing which was utilized in this case. See Point II, *infra,* pp. 38 *et seq.* Moreover, the various decisions holding *Gutknecht* fully retroactive underscore its constitutional holding. See Point II, *infra,* p. 46.

In *Hodges* v. *United States*, 282 F.2d 858, 866 (D.C. Cir. 1960), Judge Fahy anticipated much of what this Court would explicate in greater detail in *Sanders* by pointing

[18] But see *Brough* v. *United States*, 454 F.2d 370 (7th Cir. 1970), where post-conviction relief was granted on the basis of intervening statutory holdings.

out that the essence of §2255 was to provide a forum for claims "arising only in such circumstances as to be assertable collaterally rather than directly, as is the case when the ground asserted is a violation of the laws of the United States." Accord: *Larson* v. *United States*, 275 F.2d 673, 679 (5th Cir. 1960) (per Wisdom, J.). It is plain that an intervening change in the law which occurs post-appeal is, by its very nature a claim which is "assertable collaterally rather than directly." Any attempts to pursue such a claim on direct appeal by urging or anticipating a change in the law may or may not be successful. But the claim is only "assertable" as a change of law, i.e., entitled to relief, after the intervening change in the law has occurred.[19]

3. *Post-conviction relief is compelled in this case because the intervening change in the law must be retroactively applied.*

The logic of *Kaufman* v. *United States, supra,* and *Sanders* v. *United States, supra,* which authorize post-conviction relief where justice so requires, including a case where there has been an intervening change in the law to petitioner's benefit, would seem to compel the granting of such relief where the intervening change in the law is of a character which must be applied retroactively. This Court has squarely so held in the recent decision of *Robinson* v. *Neil,* —— U.S. ——, 35 L. Ed.2d 29 (1973).

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[19] It is therefore logically impossible to contend (Memo in Opp., p. 5) that in this case petitioner's change of law claim has been adjudicated on direct appeal, and is consequently not within the *Kaufman* rationale. On direct appeal, the claim that *Gutknecht* was improperly applied by the district court was certainly not a claim of new law, since the new law, the *Fox* decision, had not yet been born. The government's position only makes sense if applied to a change in law which occurs in time to be urged on direct appeal, and is urged on direct appeal, but rejected. Only in that event can it be said that "the claim had already been adjudicated." (Memo in Opp., p. 5.)

The petitioner in *Robinson* was a state prisoner who sought federal habeas corpus after his Tennessee conviction had been affirmed in the state courts, "basing his arguments on this Court's intervening decisions in Benton v. Maryland, 395 US 784 . . . 1969, and Waller v. Florida, 397 US 387 . . . 1970," 35 L. Ed.2d at 31. The Court noted at the outset of its opinion that *certiorari* was granted for the specific purpose of deciding the retroactivity of *Waller v. Florida*, which construed the double jeopardy clause of the Fifth Amendment. After summarizing the principles of retroactivity established by this Court in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court concluded that the *Linkletter* test of retroactivity, i.e., limiting retrospective effect solely to "those procedural rules affecting the very integrity of the fact finding process," 35 L. Ed.2d at 33, was simply inapplicable to a case which did not involve "procedural rights and methods of conducting trials . . ." 35 L. Ed.2d at 32. Writing for the Court, Mr. Justice Rehnquist pointed out:

> "The guarantee against double jeopardy is significantly different from procedural guarantees held in the Linkletter line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules which govern the conduct of a trial." 35 L. Ed.2d at 33.[20]

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[20] The effect of a successful double jeopardy claim is to prevent a second trial from taking place at all. But the effect of a successful claim that an induction order is invalid is to vacate the initial conviction and dismiss the indictment. Thus Mr. Justice Rehnquist's rationale should apply *a fortiori* to this case.

It is significant that no member of the Court, which was unanimous in its holding in favor of retroactivity, even intimated that petitioner should not have been entitled to have his claim for habeas corpus relief, based on "intervening decisions," 35 L. Ed.2d at 31, fully entertained and considered on the merits. Compare *Schneckloth* v. *Bustamonte*, —— U.S. ——, 36 L. Ed.2d 854, 876 (1973) (concurring opinion of Mr. Justice Powell).

Indeed, an intervening change in the law which must be retroactively applied would appear to be the most singularly appropriate occasion for the grant of post-conviction relief under 28 U.S.C. §2255. See *Brough* v. *United States*, 454 F.2d 370 (7th Cir. 1972);[21] *Gray* v. *United States*, 407 F.2d 831 (5th Cir. 1969); *Scogin* v. *United States*, 446 F.2d 416 (8th Cir. 1971). As Judge Austin succinctly pointed out in *Escobedo* v. *United States*, 350 F. Supp. 894, 895-896 (N.D. Ill. 1972), the *Sanders* doctrine is invoked where there are "intervening decisions which would retroactively set aside plaintiff's convictions. . . ."

As is demonstrated below, see Point II, *infra*, p. 46, *Gutknecht* v. *United States* has been held fully retroactive by every court of appeals which has ruled on its retroactivity, and by virtually every district court. The Solicitor General, although unjustifiably accusing petitioner of urging "a broad rule of automatic and universal retroactivity" (Memo. in Opp., page 6), does not intimate that *Gutknecht* should not be given fully retroactive application. And

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[21] In *Brough*, a §2255 case where *Toussie* v. *United States*, 397 U.S. 112 (1970), was held fully retroactive, Judge Hastings engages in a thorough analysis of this Court's retroactivity decisions, and concludes: "At no time has it [this Court] denied retroactive application to a *statutory* interpretation which would invalidate a prior conviction." 454 F.2d at 372.

since *Fox* is simply an application of *Gutknecht* to a species of delinquency processing, the Solicitor General would be hard pressed, we respectfully suggest, to find some basis for urging that while *Gutknecht* should be retroactively applied, *Fox* should not.[22]

Finally, it is even more significant that in the one case which had occasion to consider whether or not *Fox* should be applied retroactively, it was retroactively applied. In *Zack* v. *Benson*, 454 F.2d 596 (9th Cir. 1971), decided the same day as *United States* v. *Fox*, a different panel of the Ninth Circuit granted §2255 relief to a federal prisoner "on the authority of *United States* v. *Fox*." *Ibid.*[23]

4. *In any event, post-conviction relief should have been granted in this case in the interest of justice.*

This Court concluded its systematic delineation of grounds for §2255 relief by the repeated reminder that "the test is 'the ends of justice' and it cannot be too finely particularized." *Sanders, supra*, 373 U.S. at 17. That the ends

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[22] It is significant that in all of his submissions to this Court in opposition to *certiorari*, both on the prior unsuccessful petition from *Davis II* as well as this one from *Davis III*, the Solicitor General, while indicating the Government's disagreement with *Fox*, and urging this Court not to consider the question on the basis of a post-*Fox* change in regulation, see Point II, *infra*, pp. 40-41, at no point made the argument that *Fox* should only be given prospective application. Indeed, the intimation in the Memorandum in Opposition is that *Fox* might well have retroactive application because the Solicitor General refers to an unknown number of "untried indictments . . . involving facts and situations similar to the one in this case. . . ." Memo. in Opp., page 4.

[23] For a delineation of cases which have consistently applied retroactively decisions which overturn or construe Selective Service regulations and procedures, see *Brough* v. *United States, supra*, 454 F.2d at 373.

of justice will be served by granting §2255 relief in this case is clear beyond question. To begin with, there has been no "deliberate bypass" of any possible remedy available to petitioner. Compare *Fay* v. *Noia, supra,* 372 U.S. at 438; *Sunal* v. *Large, supra.* Moreover, the special problems of sensitivity to federal-state relations which would be of serious moment in a habeas corpus application are completely removed from this §2255 case. Thus the concerns expressed by Mr. Justice Powell and the other Justices who joined in his concurring opinion in *Schneckloth* v. *Bustamonte,* —— U.S. ——, 36 L. Ed.2d 854, 876 (1973), are inapplicable to this case.

Moreover, this is not a case where a collaterally raised claim, even if constitutionally justified, would have no bearing on the guilt or innocence of the defendant. Cf. Mr. Justice Black's dissenting opinion in *Kaufman* v. *United States,* 394 U.S. at 231 *et seq.; Schneckloth* v. *Bustamonte, supra* (concurring opinion of Mr. Justice Powell). On the contrary, if §2255 relief is granted to petitioner no retrial will be required by reason of any criticized exclusionary rule, and there is no danger that a person guilty of a crime will go free simply because a fine point of search and seizure law makes it impossible to convict him. This case goes to the substantive offense—the validity of an induction order. If the induction order is invalid, because it resulted from congressionally unauthorized delinquency status, then the crime of induction refusal has not been committed. Such was the result in *Fox,* and no less, it is respectfully submitted, should occur here.

In *Scogin* v. *United States,* 446 F.2d 416 (8th Cir. 1971), the Court of Appeals granted §2255 relief on the ground of this Court's decisions in *United States* v. *Covington,* 395

U.S. 57 (1969), and *Leary* v. *United States*, 395 U.S. 6 (1969), held retroactive in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971). Relief was granted notwithstanding a strong argument of waiver urged by the government inasmuch as Scogin pleaded guilty and did not appeal from his conviction. The court rejected the Government's argument that "a voluntary guilty plea, made in the light of the law applicable at the time it was entered, does not become vulnerable to attack because later judicial decisions indicate that the choice to plead guilty rested on a faulty premise." 446 F.2d at 420. It is inconceivable that the Eighth Circuit would have ruled otherwise if Scogin had attempted to anticipate the *Covington-Leary-Coin & Currency* decisions, and had urged those arguments at trial and on appeal, but had lost nonetheless. In both situations a rationale which commends itself to the "ends of justice" objective of §2255 is that of Chief Judge Matthes in *Scogin*, 446 F.2d at 420:

> "... we are convinced that to allow one to continue to be penalized for conduct which is now constitutionally immune from punishment would contravene basic concepts of justice and fairness." [24]

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[24] The First Circuit has held in a closely related context:

> "To accord [the decision in question] other than fully retroactive effect would be to make what was not a crime for one registrant a crime under the same statute for another registrant. . . . Cf. United States v. United States Coin and Currency, 401 U.S. 715 (1971)."

United States v. *Fargnoli*, 458 F.2d 1237, 1238 (1st Cir. 1972). See also *United States* v. *Fargnoli*, 354 F. Supp. 987 (D.R.I. 1973); *United States* v. *Ramos*, 319 F. Supp. 1207 (D.R.I. 1970); *United States* v. *Kelly*, 314 F. Supp. 500 (E.D.N.Y. 1970).

II.

The decision below should be reversed and the judgment of conviction vacated, because petitioner's conviction for induction refusal, factually identical with that of appellant in *United States* v. *Fox*, 454 F.2d 593 (1973), was predicated on an invalid, delinquency-based induction order in conflict with the teaching of *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

All parties to this litigation agree that the decisions below are in direct conflict with the subsequent decisions of the Ninth Circuit in *United States* v. *Fox*, 454 F.2d 593 (1971), and *Zack* v. *Benson*, 454 F.2d 596 (1971). The Solicitor General has twice conceded this. See Supplemental Memorandum for the United States in Davis v. United States, 71-661, Oct. T. 1971, p. 2, and Mem. in Opp., p. 2, to the instant petition. These decisions, in turn, are bottomed upon the decision of this Court in *Gutknecht* v. *United States*, 396 U.S. 295 (1970).

In *Gutknecht* v. *United States*, *supra*, this Court held that the delinquency regulations, 32 C.F.R. Part 1642 (1969), were not authorized by Congress.[25] Consequently,

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[25] The Court wrote:

> "The power under the regulations to declare a registrant 'delinquent' has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not congenial to our lawmaking traditions. . . . We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. Nor do we read it as granting personal privileges that may be forfeited for transgressions that affront the local board. If federal or state laws are violated by registrants, they can be prosecuted." 396 U.S. at 306-307.

See also *Breen* v. *Selective Service Local Board*, 396 U.S. 460 (1970); *Oestereich* v. *Selective Service Board*, 393 U.S. 233 (1969); *Bucher* v. *Selective Service System, Local Boards No. 2 etc.*, 421 F.2d 24, 27-28 (3d Cir. 1970).

local boards were without power to order registrants to report for induction pursuant to those regulations. Petitioner was unarguably ordered to report for induction as a delinquent (A15, A16). He had been declared delinquent for failing to report for a physical examination (A14). Pursuant to 32 C.F.R. §1631.7(a) (1969), he was selected and ordered to report for induction notwithstanding that he had not taken a physical examination and thus (1) had not been found acceptable for service in the armed forces, and (2) had not been mailed a new "Statement of Acceptability" (DD Form No. 62) to that effect (8a, A6).

The Selective Service System's delinquency regulations, 32 C.F.R., Part 1642 *supra*, at the time they came before this Court for review in *Gutknecht*, were given teeth through the priority induction provisions of 32 C.F.R. 1631.7(a) (1969). Indeed, the primary punitive sanction of the entire delinquency scheme, priority induction, was nowhere enunciated in Part 1642. Rather, 32 C.F.R. 1642.13 provided that delinquents were to be ordered "to report for induction in the manner provided in section 1631.7. . . ." Thus, this Court in *Gutknecht* reviewed *in extenso* the priority induction scheme provided for in Part 1642, and executed through 1631.7(a)(1), and flatly invalidated *the entire scheme*. See 396 U.S. at 298, n. 1, and accompanying text. Moreover, the government's assertion that *Gutknecht* "did not involve Section 1631.7(a)," p. 7, Memo. in Opp., in Davis v. United States, 71-661, Oct. T. 1971, is a disingenuous retreat from the previous admission set forth in the Government's brief at p. 136, n. 22, in *Gutknecht* v. *United States*, No. 71, Oct. T. 1969:

> "... 32 C.F.R. 1631.7. That regulation, providing for the priority induction of delinquents and volunteers ahead

> of all other registrants, *is in turn linked to 32 C.F.R. 1642.13,* which calls for the induction of delinquent registrants 'in the manner provided in section 1631.7. . . .'" (Emphasis added.)

Under regulations in force at the time petitioner was ordered for induction,[26] the only persons who could be ordered and inducted without first being given a pre-induction physical examination and statement of acceptability were three classes of registrants: conscientious objectors, volunteers, and delinquents. 32 C.F.R. §§1660.20(a); 1628.10 (1951); 1631.7(a) (1969); *United States* v. *Hayden,* 445 F.2d 1365, 1370 (9th Cir. 1971); *United States* v. *McClintock,* 311 F. Supp. 1119 (N.D. Cal. 1970). But, it is not the denial of this vital procedural right—the right to a full pre-induction physical examination, and a formal finding of acceptability—of which petitioner is most aggrieved. Rather, it is the violation of the underlying regulatory scheme which, while resulting in the denial of vital procedural safe-

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[26] 32 C.F.R. 1631.7(a) was amended by Executive Order No. 11537, F.R. 9991, of June 18, 1970, to provide that:

> ". . . notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I-A or Class I-A-O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such a case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined." See 3 U.S. Code Cong. & Admin. News, 1970 at p. 6259.

guards,[27] more importantly did not permit the issuance to a registrant, such as petitioner, of any induction order at all.

But for his being declared delinquent, he could not, under then existing regulations, be lawfully ordered to report for induction. *United States* v. *Fox, supra,* 454 F.2d at 595; *United States* v. *Kohls,* 441 F.2d 1076, 1077 (9th Cir. 1971); *United States* v. *McClintock, supra,* 311 F. Supp. at 1121. Indeed, the Ninth Circuit has expressly held that the June 1970 amendment to 1631.7(a)[28] was created specif-

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[27] The government, in its petition for rehearing in *Fox* at p. 17, argued that the application of *Gutknecht* to cases such as *Davis* and *Fox* was improper because no prejudice accrued by virtue of the provisions of ¶3-18 of AR 601-270, SSLR 2246, which required that a complete physical examination be administered on the day of the delinquent's induction. Of course this is still prejudicial, because a registrant who has not been declared delinquent is entitled to both a pre-induction physical examination, 32 C.F.R. §§1628.10 *et seq.*, and a second physical examination on the day of induction pursuant to Army Regulations, see AR 601-270. But even in the absence of prejudice the government's position misreads the basis of the *Gutknecht* decision. In *Clay* v. *United States,* 403 U.S. 698 (1971), this Court recognized that the federal judiciary had a specific interest in insuring the legal integrity of the Selective Service System by requiring that a man's induction not be accomplished through unlawful means. Quoting its prior decision in *Sicurella* v. *United States,* 348 U.S. 385, 392 (1955), this Court stated that *"the integrity of the Selective Service System demands"* that an induction not be accomplished by illegal procedures. 403 U.S. at 704 (emphasis added). No less can be said for delinquency cases. See *Battiste* v. *United States,* 428 F.2d 801, 802 (5th Cir. 1970).

[28] It is interesting to note that the June, 1970, amendment to §1631.7, was accomplished solely by executive order and without any authorizing statutory amendment. *Contra, Gutknecht, supra,* 396 U.S. at 307; *Greene* v. *McElroy,* 360 U.S. 474 (1959). For a holding that the amendment itself operates as a punitive acceleration, see *United States* v. *Castillo,* —— F. Supp. ——, 72 Cr. 153 (D.P.R. March 23, 1973).

ically to deal with the implication that this Court's decision in *Gutknecht* invalidated the procedure therein authorized. *United States* v. *Ossa*, 470 F.2d 816, 818-819 (1972). See *United States* v. *Malone*, 336 F. Supp. 1324, 1329 (N.D. Cal. 1972).

The Ninth Circuit in *United States* v. *Fox, supra*, is not the only court of appeals which has adopted a *per se* rule that a declaration of delinquency for failure to appear at a physical examination contaminates an induction order based upon such delinquency. A similar rule was adopted in the Fifth Circuit in *Battiste* v. *United States*, 428 F.2d 801, 812 (5th Cir. 1970). In *Battiste*, as in *Fox*, and as in the case of petitioner, the defendant was declared relinquent for failure to report for a physical examination, and was ordered to report for induction as a delinquent. On the appeal from Battiste's conviction for induction refusal, the government argued that the *Gutknecht* doctrine required no more than a remand to the district court for the purpose of determining whether Battiste's induction had been accelerated as a matter of fact. But the Fifth Circuit rejected this argument, and held that remand was unnecessary because even if the government proved that the induction order was not accelerated in fact:

> "... we would hold the induction order invalid. It is expressly based upon a regulation that the Supreme Court held illegal in *Gutknecht* and we cannot nullify the clear holding of that Court on the basis of isolated observations in the opinion." 428 F.2d at 802.[29]

[29] The clear language of the Fifth Circuit rule invalidating any induction order where it appears from the record "that the induction order was *expressly based upon* his delinquency status", see *United States* v. *Sellers*, 315 F. Supp. 1024, 1025 (N.D. Ga. 1970), should be a complete answer to the government's attempt to dis-

The priority induction regulatory scheme here in issue, authorizing as it did the induction of alleged delinquents without any lawfully valid statutory basis,[30] hardly comports with this Court's holding in *Gutknecht* that, in accordance with the language of Sec. 5(a)(1) of the Military Selective Service Act of 1967,[31] "the selection of persons for training and service shall be accomplished in an impartial manner", 396 U.S. at 304. For example, 32 C.F.R. §1642.4, at all times pertinent, described a Selective Service delinquent as one who has:

> "failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction . . . ."

In *Gutknecht* v. *United States, supra,* the duty transgressed was the requirement that a registrant have in his personal possession a registration certificate and current classification notice. 32 C.F.R. §§1617.1; 1623.5. In *Fox,* and the instant case, the violation was identical to *Peet* v. *United States,* 399 U.S. 523 (1970), vacating 420 F.2d 549

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tinguish *Battiste* from this case on the facts, see Memo. in Opp., page 4, n. 2. In *United States* v. *Sellers, supra,* the district court, in ruling, on the authority of *Battiste,* that a delinquency declaration which preceded a prior induction order does not necessarily contaminate a second induction order, clearly recognizes the *per se* invalidation of any induction order "expressly based upon" delinquency status.

[30] 32 C.F.R. §§1642, 1631.7(a) and Local Board Memorandum (LBM) No. 14, ¶3.(c), at SSLR 2160, authorized and directed accelerated induction and removal from the normal order of call for registrants who have transgressed the regulatory requirement to submit to a physical examination.

[31] 50 U.S.C. App. §455(a)(1). This language was reenacted as part of the Selective Service Act of 1971. See 50 U.S.C. App. §455(a)(1) (1971).

(9th Cir. 1969), where the petitioner had been convicted of failing to report for induction as a delinquent—his delinquency status stemming from a prior failure to undergo a pre-induction physical examination in violation of 32 C.F.R. §1627. See also *United States* v. *Kohls, supra.*

Delinquency status, prior to the decision in *Gutknecht*, permitted, *inter alia*, three types of action to be taken by a local board which would hasten a registrant's induction. First, he could be reclassified from a deferred or exempt status into classification I-A (available for military service). 32 C.F.R. §1642.12. Second, a registrant in Class I-A, either classified properly, or as a result of a "punitive reclassification" under 1642.12, *supra*, could be "accelerated", i.e., inducted prior to all other registrants under the then prevailing regulatory scheme. See 32 C.F.R. §§1642.13; 1631.7; *Gutknecht, supra* at 298. The third possibility, is that 32 C.F.R. §1631.7, as then in effect, permitted the induction of a registrant who was delinquent and I-A,

> "notwithstanding the fact that he has not been found acceptable for service in the armed forces and has not been mailed a Statement of Acceptability (DD Form No. 62)." 32 C.F.R. §1631.7 (1963)."

Thus registrants declared delinquent such as Fox and petitioner Davis could be subjected to a third form of treatment which is no less in violation of the congressional mandate, relied upon by this Court, in *Gutknecht, supra*, that "selection of persons for training and service [be made] in an impartial manner." 50 U.S.C. App. §455(a)(1) 396 U.S. at 304.

As was Fox, petitioner was unarguably ordered to report for induction as a delinquent. He also had been declared delinquent for failing to report for a physical examination. Pursuant to 32 C.F.R. §1631.7(a), he also was selected and ordered to report for induction notwithstanding the fact that he had not taken a physical examination and thus (1) had not been found acceptable for service in the Armed Forces, and (2) had not been mailed a new "Statement of Acceptability" (DD Form No. 62) to that effect. *But for his being declared delinquent, he could not have been ordered to report for induction* under then existing regulations without being found acceptable for service and without being mailed a Statement of Acceptability. Since the delinquency regulations have been declared unauthorized and constitutionally invalid, petitioner's induction order based solely upon his status as a delinquent must also be held to be invalid. *United States* v. *Fox, supra; Zack* v. *Benson, supra.*

The effect of this Court's holding in *Gutknecht*, as explicated by the decision in *Fox*, is clear: upon petitioner's failure to report for a physical examination, the only option open to the local board consistent with the mandate of the statute, prior to the amendment of §1631.7, was to report him to the United States Attorney for prosecution for that violation. *Fox, supra,* at 596. He could not be alternatively processed for induction. The order was consequently invalid and the indictment should have been dismissed on this ground.

Nowhere in the opinion below is there any intimation by the *Davis III* panel that petitioner's case, on its facts, does not come within the *Fox* and *Zack* rule. Rather, there is merely an unexplained refusal to apply *Fox* and *Zack* to *Davis*, "under circumstances such as here presented,"

472 F.2d at 596. These "circumstances," whatever they may be, have never been explained.

This *ipse dixit* is particularly unilluminating in view of the virtually uncontested line of cases, including the Ninth Circuit's own decisions in *Andre* v. *Resor*, 443 F.2d 921 (1971), affirming 313 F. Supp. 957 (N.D. Cal. 1970), and *Zack* v. *Benson, supra*, holding *Gutknecht* to be retroactive. See *United States* v. *Kelly*, 314 F. Supp. 500 (E.D. N.Y. 1970); *Foster* v. *United States*, 320 F. Supp. 646 (D. Conn. 1970); *United States* v. *Rumon*, 315 F. Supp. 1126 (W.D. Pa. 1970); *Swartz* v. *United States*, 3 SSLR 3424 (C.D. Cal. 1970); *Akeson* v. *United States*, 4 SSLR 3430 (D. Colo. 1970); *Kittrell* v. *United States*, 4 SSLR 3439 (N.D. Fla. 1971); *Mikesell* v. *United States*, 3 SSLR 3390 (W.D. Mich. 1970). See also *Bradley* v. *Laird*, 449 F.2d 898 (10th Cir. 1971); *Bruce* v. *United States*, 448 F.2d 21 (4th Cir. 1971). *Contra, United States* v. *Crocker*, 313 F. Supp. 831 (D. Minn. 1970); *Chandler* v. *United States*, 332 F. Supp. 397 (D. Md. 1971).[22]

In the first petition for certiorari, Oct. Term, 1971, 71-661, seeking review by this Court of the decision in *Davis II*, prior to the Ninth Circuit decision in *United States* v. *Fox, supra*, petitioner argued that *Davis II* was inconsistent with the decision of the Fifth Circuit in *Batiste* v. *United States, supra*, and was likewise inconsistent

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[22] The decision in *Chandler* is of questionable validity in light of the Fourth Circuit's subsequent decision in *Bruce, supra*, decided eight days later. Petitioner respectfully submits that there can be little question as to the retroactivity of this Court's decision in *Gutknecht*. See the excellent analysis of this question by Chief Judge Zavatt in *United States* v. *Kelly, supra*. See also, *Andre* v. *Resor, supra*. Petitioner respectfully submits that for the same reasons explicated by Chief Judge Zavatt in *Kelly*, *Fox* must also be held to be retroactive. See Point I, *supra*, pp. 32-35.

with the decision of the Fourth Circuit in *United States* v. *Dobie*, 444 F.2d 417 (1971). In *Battiste*, as we discussed *supra*, pp. 42-43, the Fifth Circuit, interpreting *Gutknecht*, established a *per se* rule of invalidation of any delinquency-based induction order, and factual determination of acceleration became irrelevant. Since the Ninth Circuit in *United States* v. *Fox* has now adopted a similar rule, it would seem unnecessary for this Court to rule on whether the decisions below are likewise in violation of the intermediate *Dobie* rule of the Fourth Circuit.

Nevertheless, petitioner submits that his conviction cannot stand under either the *Dobie* rule or the *Fox-Battiste* rule. In *Dobie*, the Fourth Circuit held that in the case of a delinquency induction acceleration is presumed and the government must sustain a heavy burden to disprove it. The Fourth Circuit expressly rejected opinion evidence of the local board clerk, and carefully outlined the objective documentary evidence which was necessary. Moreover, the Fourth Circuit ruled that the test was not whether *younger* men were called at the same time as or before defendant—the meaningless test utilized by the district court below (8a)—but whether *older* men were available and uncalled. 444 F.2d at 420-421.[33]

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[33] The Fourth Circuit held in *Dobie*:

"To disprove Dobie's acceleration, the government should have produced objective evidence of a more substantial nature than the opinion of the clerk. This is especially true when the records on their face indicate acceleration and the government has in its possession other documents which would have established whether he could have been called in the proper order." 444 F.2d at 421-422.

Accord: United States v. *Dudley*, 451 F.2d 1300, 1303-1304 (6th Cir. 1971) (correct test for acceleration in fact is whether "men older than Appellant were not called prior to Appellant").

That the *Dobie* rule, or indeed any rationale which places the government under a strict burden of proof in the event of a delinquency induction, would require the vacating of petitioner's conviction, is evident from the fact that the district court on remand after *Davis I* made a finding of no acceleration precisely on the erroneous theory, faulty reasoning, and insufficient evidence rejected by the Fourth Circuit in *Dobie*. See 2a-4a; A5-A7.[24]

[24] Since this case does not present a factual situation where a defendant could be acquitted only under the *Fox* rule, but would be convicted under the *Dobie* standard, there is no occasion for this Court to consider whether one standard is preferable to the other. Moreover, since petitioner should obviously be entitled to the benefit of the rule in his circuit, and since that is the *per se Fox* rule, we have omitted a more detailed and systematic analysis of the problems of proof and documentation presented in Selective Service litigation over acceleration in fact and order of call questions. See Petition for Certiorari in *Davis* v. *United States*, October T. 1971, 71-661 (*Davis II*), pages 11-16.

CONCLUSION

For all of the foregoing reasons the decision below should be reversed, the judgment of conviction should be vacated, and the indictment should be dismissed.

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Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965) 29

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of relief under 28 U.S.C. 2255 (Pet. App. 18a–19a) is reported at 472 F.2d 596. The order of the district court denying relief (Pet. App. 15a–17a) is unreported.

The order of this Court denying certiorari from the decision of the court of appeals affirming petitioner's conviction is reported at 405 U.S. 933. The order of the court of appeals denying a petition for rehearing with a suggestion for rehearing *en banc* (Pet. App. 12a) is not reported. The opinion of the court of appeals affirming the conviction (Pet. App. 11a) is re-

ported at 447 F.2d 1376. The oral findings of the district court (Pet. App. 2a–6a) and the written findings of fact and conclusions of law after remand (Pet. App. 7a–10a) are not reported. The opinion of the court of appeals remanding the original appeal for further hearings is reported at 432 F.2d 1009.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1972. Mr. Justice Douglas extended the time for the filing of a petition for a writ of certiorari until April 25, 1973, and the petition was filed on that date. This Court granted certiorari on November 5, 1973. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant charged with failing to report for induction under 50 U.S.C. App. 462 after failing to report for his physical examination can defend on the ground that he has not been given a physical examination.

2. Whether a Section 2255 motion that alleges the invalidity of a conviction for failing to comply with an order to report for induction on the ground that the order was technically not authorized by valid regulations states a claim subject to collateral relief after a final judgment of conviction.

3. Whether, if the decision of the Ninth Circuit in *United States* v. *Fox* is correct, that decision should be applied retroactively.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

50 U.S.C. App. 455(a)(1) provides in pertinent part:

The selection of persons for training and service under section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted * * *

32 C.F.R. (1967 rev.) 1602.4 provided:

A "delinquent" is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.

32 C.F.R. (1967 rev.) 1642.4 provided in pertinent part:

> (a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.
>
> (b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101.). * * *

Former 32 C.F.R. (1967 rev.) 1631.7 provided in pertinent part:

> (a) Each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I–A and Class I–A–O and have been found acceptable for service in the Armed

Forces and to whom the local board has mailed a Statement of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: *Provided,* That a registrant classified in Class I–A or Class I–A–O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form No. 62): *And provided further,* That a registrant classified in Class I–A or I–A–O who has volunteered for induction may, if an appeal is not pending in his case and the period during which an appeal may be taken has expired, be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form No. 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first. * * *

32 C.F.R. (1971 rev.) 1631.7 provided in pertinent part:

(a) When a call is received by a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, or for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, the Executive

Secretary or clerk, if so authorized, or a local board member shall select, as provided herein, and issue orders to report for induction to the number of men required to fill the call from among its registrants who have been classified in Class I–A or Class I–A–O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed at least 21 days before the date fixed for induction: *Provided,* That notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I–A or Class I–A–O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined: *Provided further,* That a registrant classified in Class I–A or Class I–A–O who has volunteered for induction may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. * * * [The substance of this revision is now to be found in 32 C.F.R. 1631.6(a).]

STATEMENT

1. THE SECTION 2255 PROCEEDINGS

On June 5, 1972, petitioner filed a motion under 28 U.S.C. 2255 alleging that the decision of the Ninth Circuit in *United States* v. *Fox*, 454 F.2d 593, required that his conviction under 50 U.S.C. App. 462 for failing to report for induction be set aside (R. 7).[1]

The district court denied petitioner's motion (Pet. App. 15a–17a), and the court of appeals affirmed, *per curiam*, stating that the issue had been decided adversely to petitioner on direct appeal and that he therefore could not collaterally attack his conviction on the same ground (472 F.2d 596; Pet. App. 18a-19a). It also noted that the *Fox* court had not purported to overrule the prior decision by another panel of the Ninth Circuit in petitioner's case, which had affirmed petitioner's conviction after consideration and rejection of the arguments found valid in *Fox*. Petitioner did not seek rehearing *en banc* from the affirmance of the denial of his Section 2255 motion.

2. THE PROCEEDINGS ON DIRECT REVIEW OF PETITIONER'S CONVICTION

a. After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of having failed to report for

[1] *Fox* had held on facts similar to those involved in this case that since, as a result of his delinquent status, Fox was ordered to report for induction without having taken a physical or receiving a statement of acceptability, his induction order was invalid under *Gutknecht* v. *United States*, 396 U.S. 295.

induction on July 11, 1967, in violation of 50 U.S.C. App. 462. He was sentenced to three years' imprisonment.[2]

The facts adduced at trial showed that on October 4, 1963, petitioner registered with Local Board No. 101, Los Angeles, California (SSF 2) and was classified I-A on February 3, 1965 (SSF 3).[3] On February 16, 1965, the local board sent petitioner an order directing him to report for a physical examination on March 4, 1965 (SSF 26). The order was mailed to a Los Angeles post office box which, less than two months before, petitioner had specified as his mailing address (SSF 5). Petitioner failed to appear for the physical examination (A. 12). He subsequently wrote his local board that illness had prevented him from reporting for the physical as ordered (SSF 28–29).

On September 19, 1965, the local board mailed to petitioner at the same address an order to report for a physical examination on October 8, 1965 (SSF 30). The letter was returned to the local board three days later stamped "addressee unknown" (SSF 31). Petitioner did not report for the physical as directed (A. 12).

On December 6, 1965, the local board wrote petitioner at the post office box address to warn him that it was considering declaring him a delinquent because of his failure to report for the October 8, 1965, physical (A. 13). This communication was returned to the

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[2] After petitioner had served four months of his term, the district court reduced the sentence to three years' probation.

[3] "SSF" refers to petitioner's Selective Service File (Gov't Ex. #1), which was received into evidence at trial (Tr. 41).

local board on December 15, 1965, also stamped "addressee unknown" (SSF 33).

The local board thereupon wrote to one Walter Suthern of Los Angeles, whom petitioner had previously indicated would always know his current address (SSF 5 and 36). On March 2, 1966, the board received a reply from Mr. Suthern giving 3781 1/4 Menlo, Los Angeles as petitioner's proper address (SSF 36). On April 6, 1966, the local board remailed the delinquency warning to the Menlo address (SSF 33). On April 14, 1966, the letter was returned stamped "unknown at address" (SSF 35).

On May 4, 1966, the local board declared petitioner a delinquent pursuant to 32 C.F.R. 1642.4 and mailed him a delinquency notice at the Menlo address (A. 14). That same day, petitioner appeared at the local board and completed a questionnaire on which he gave 3781 1/4 Menlo as his current mailing address (SSF 41). On February 21, 1967, the local board mailed to the Menlo address an order directing petitioner to report for induction on March 7, 1967 (A. 15). The order was returned stamped "addressee unknown" on February 23, 1967 (SSF 44). Petitioner did not report on the day set for induction (A. 12).

On June 20, 1967, the local board sent petitioner an order to report for induction on July 11, 1967 (A. 16). This time the board mailed the induction order to a St. Paul, Minnesota address which petitioner had used in May 1966, when requesting a duplicate draft card (SSF 37). On July 11, 1967, petitioner again failed to report for induction. His prosecution for

that failure to report then followed, and he was convicted.

On appeal, the court of appeals remanded the case to the district court "without limitation of scope but especially for consideration of the case in the light of the intervening decision of *Gutknecht* v. *United States*, 396 U.S. 295" (432 F. 2d at 1010; Pet. App. 1a).[4]

b. On remand, the district court conducted a hearing at which the executive secretary of the local board testified that petitioner would have been ordered inducted earlier had he not failed to appear for the physical (H. Tr. 42). The government, in corroboration, introduced the local board's "delivery lists" (A. 17–25), which showed the induction dates of other registrants at petitioner's local board (H. Tr. 43). The district court found that if petitioner had complied with the local board's procedures and had not been declared a delinquent, he would have been ordered to report for induction by November 15, 1966—almost eight months before the date on which he finally failed to report (July 11, 1967) (Pet. App. 8a). From these facts, the district court concluded that petitioner's induction order had not been accelerated because of his delinquency status and that *Gutknecht* was therefore inapplicable. The district court further concluded that petitioner's rights were not prejudiced when the local board ordered him to report for induction without first

[4] In *Gutknecht*, this Court held the delinquency regulations invalid when applied to accomplish a punitive acceleration of the defendant's induction.

giving him a physical and sending him a notice of acceptability, since the lack of the physical and of the notice resulted from petitioner's own failure to report for a physical examination as ordered. Moreover, the district court noted that petitioner would have received a complete physical examination prior to induction on July 11, 1967, if he had reported on that date as ordered (Pet. App. 9a–10a). Accordingly, the district court declined to set aside petitioner's conviction.

The court of appeals affirmed, *per curiam* (447 F. 2d 1376; Pet. App. 11a). A petition for rehearing with a suggestion for rehearing *en banc* was denied on September 13, 1971 (Pet. App. 12a). This Court, although advised of the intervening *Fox* decision, denied certiorari on February 22, 1972 (405 U.S. 933; Pet. App. 13a).

Nearly two months later, petitioner filed in the court of appeals a "Motion for Extension of Time in Which to File a Petition for Rehearing." The court of appeals, noting that certiorari had been denied on February 22, 1972, and that the motion "was not tendered for filing in this court until the 19th day of April, 1972," rejected the tender and ordered the clerk to return the motion to petitioner (Pet. App. 14a). Petitioner then instituted this Section 2255 proceeding.

SUMMARY OF ARGUMENT

There are three independently sufficient reasons why the decision of the court of appeals should be affirmed: (1) The conviction of petitioner was proper; (2) his claim is not of a type subject to collateral re-

lief under 28 U.S.C. 2255; and (3) even if the rule of *United States* v. *Fox*, 454 F. 2d 593, on which he principally relies, is correct, it should be applied prospectively and should not operate as a basis to vacate this conviction. Although, in the procedural context of this case, the Court should first consider whether or not petitioner's claim is of a type subject to collateral relief, it facilitates exposition to discuss first his substantive claim.

I

The conviction of petitioner for refusing to report for induction was proper because his induction order was properly issued by the local board. Although petitioner's induction order was, under the regulation then in effect, technically based on his delinquency in failing to appear as ordered for his physical examination, that does not render the order defective. *Gutknecht* v. *United States*, 396 U.S. 295, did not hold that any induction order based upon delinquency status is invalid, but only invalidated the delinquency regulations when they led to an induction order issued as a punitive sanction resulting in acceleration of a registrant's induction or deprivation of an exemption or deferment to which he may have been entitled.

As applied to petitioner, the sole effect of the delinquency declaration was to waive the requirement of another portion of the regulations that a physical examination and statement of acceptability precede the issuance of an order to report for induction. It was petitioner who, by his deliberate misconduct, made it impossible to administer a physical examination; in-

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deed, petitioner would still have received his physical examination prior to induction had he reported as ordered. Moreover, petitioner's conviction turned upon a factual finding that he was ordered to report for induction several months later than he otherwise would have been, so that his delinquency actually led to a postponement rather than an acceleration of induction. Thus, the considerations supporting the *Gutknecht* decision are entirely absent when determining the possible extension of that holding to encompass petitioner's delinquency.

Even if this Court concludes that the order to petitioner to report for induction was technically defective, it does not follow that he should be permitted to raise the defect as a defense in a criminal proceeding for disobediance of the order. Allowance of such a defense should turn on a showing that the alleged defect in the induction order prejudiced the registrant. This case contains not even the remotest suggestion of any such prejudice arising from the supposed irregularity, so that if any irregularity did exist, it should properly be viewed in this context as harmless error.

II

28 U.S.C. 2255 codifies *habeas corpus* practice, with the forum of adjudication moved from the place of incarceration to the place of sentencing. Under long-standing principles, collateral relief is available only for those claims that are of constitutional dimension. Where, as here, petitioner claims the violation of no fundamental constitutional right, and where he has had one full and fair opportunity to advance his claims, the writ is not available.

Petitioner asserts that *Gutknecht* v. *United States*, 396 U.S. 295, is a "constitutional holding," but he points to no constitutional right which he was deprived of by his conviction. His claim relates only to the Selective Service regulations in force at the time of his induction. Those regulations provided that, absent delinquency status, petitioner could not have been ordered to report for induction without a physical examination. But the right to such an examination prior to an order to report for induction is not a constitutional or even a statutory right. The fact that the Ninth Circuit, in *United States* v. *Fox, supra*, decided this issue differently and may have "changed" the law does not advance petitioner's claim, for disparities within the judicial system are not of themselves constitutional violations. While the *Fox* decision may tend to support the correctness of the arguments unsuccessfully made by petitioner in appealing his conviction, it does not transform his claim into one of a character entertainable in collateral review proceedings.

Although cases such as *Sanders* v. *United States*, 373 U.S. 1, and *Kaufman* v. *United States*, 394 U.S. 217, on which petitioner relies, suggest that change of law is relevant to the availability of collateral relief from a criminal conviction, they do not aid petitioner. Both Sanders and Kaufman were seeking a forum for vindication of constitutional claims, and their cases were solely concerned with the *procedural disabilities* that might otherwise arise from either prior litigation

of the same issue or a failure to have raised the issue in prior proceedings. We agree that if *Fox* were a change of law (a debatable proposition), *Sanders* would suggest the possibility that petitioner's claim could be entertained anew (although we submit that he could not meet the "ends of justice" test of *Sanders*), *but only provided that his claim was of an appropriate character.* Neither *Sanders* nor *Kaufman* speaks to that issue, and the applicable precedents clearly establish that it was not of such character.

III

If the decision in *United States* v. *Fox, supra,* is correct, contrary to our argument under point I, and if petitioner's claim is subject to collateral relief, contrary to our argument under point II, the rule in *Fox* should nevertheless not be given retroactive application to petitioner's case.

In *Gutknecht* and similar cases, application of the delinquency regulations operated, in subversion of the congressional policy embodied in the act, to punish registrants by accelerating induction to an earlier time than would have been lawful absent the delinquency, or to deprive them of exemptions or deferments to which they were entitled. Here, by contrast, the delinquency-based induction order to petitioner—the defect in which, if any, was purely technical—deprived him of no statutory right or benefit and imposed no detriment of any kind on him.

The Court's inquiry in retroactivity cases has been a pragmatic one primarily oriented to securing the

ends of justice. The ruling in *Fox* was largely prompted by the desire to correct technical defects in the administrative practices of the Selective Service System, preclude the possibility of abuses in the administration of that system by improper use of delinquency regulations, and avoid embroiling the courts in factual disputes as to whether there has been improper use of the delinquency regulations. None of those ends is served by giving the *Fox* decision retroactive effect to the extent that final judgments of conviction based on a factual finding that there has been no improper acceleration of induction should be disturbed. No injustice has been done to petitioner, and he has no valid claim for relief at this time.

ARGUMENT

I

PETITIONER'S CONVICTION WAS PROPER

A. PETITIONER'S INDUCTION ORDER WAS IN COMPLIANCE WITH THE CONSTITUTION, THE STATUTES AND THE REGULATIONS OF THE SELECTIVE SERVICE SYSTEM

Petitioner contends that his induction order was invalid under 32 C.F.R. (1967 ed.) 1631.7(a), which (at the time he was ordered to report for induction) [5] provided that all registrants (with the exception of delinquents and volunteers) had to be found acceptable for service in the Armed Forces and mailed a statement of acceptability at least 21 days before the date fixed for induction. Since petitioner failed to report for his physical examination, he could not have been

[5] This section was amended in 1970. See pp. 6–7, *supra*.

and was not found acceptable prior to the date of his induction order. Instead, he was found a delinquent and ordered to report for induction although he had not yet undergone a physical examination.[4] Petitioner argues that under *Gutknecht* v. *United States*, 396 U.S. 295, he could not have been declared a delinquent and that no other regulations existed under which he could have been ordered for induction without a statement of acceptability.

Petitioner's reliance upon *Gutknecht* is misplaced. In *Gutknecht*, this Court found that the Selective Service System was not authorized to use delinquency status in order to punish registrants who had failed to comply with their Selective Service obligations by accelerating their induction. But in petitioner's case delinquency was not used to punish. It was simply used as a technical device to enable the local board to order petitioner to report for induction even though he had failed to appear for his physical examination. In the context of this case, therefore, the declaration of delinquency operated as an exemption from 32 C.F.R. 1631.7(a) to deal with registrants who had failed to make themselves available for a physical examination offered pursuant to its provisions.

In *Gutknecht*, the defendant, whose classification was 1–A, was declared delinquent by his local board for failing to retain his registration and classification papers in his possession, in violation of applicable Selective Service regulations. The defendant was thereupon ordered to report for induction, about one

[4] Had he reported as ordered, he would have received a physical examination prior to induction. Pet. App. 8a.

month after he was declared delinquent and well in advance of the time when other registrants of his age would have been called. The defendant refused induction and was convicted of that offense.

This Court framed the question posed by the *Gutknecht* case as one concerning "the legitimacy of the delinquency regulations, which were applied to the petitioner, so as to deprive him of his previous standing in the order of call." 396 U.S. at 299.[7] It concluded that the delinquency regulations were invalid as applied to persons in Gutknecht's situation, stating that Selective Service does not have "broad, sweeping power * * * to discipline registrants through the 'delinquency' device" (*id.* at 305). The Court's failure to find "any clues that Congress desired the Act to have *punitive sanctions* apart from the criminal prosecutions specifically authorized" (*id.* at 307; emphasis added) and the danger that the delinquency regulation may be used "to *penalize* or *punish* the free exercise of constitutional rights" (*id.* at 308, emphasis; added) fixed the background against which the case was decided.[8] It was in that context that the Court stated that "[t]he power under the regulations to declare a registrant 'delinquent' has no statutory standard or even guidelines" (*id.* at 306).

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[7] As the Court noted (396 U.S. at 299), the government conceded in its brief that it was "unlikely that petitioner, who was 20 years of age when ordered to report for induction, would have been called at such an early date had he not been declared a delinquent."

[8] In addition, the Court had previously decided in *Oestereich v. Selective Service Board*, 393 U.S. 233, that the delinquency regulations could not be used to deprive a registrant of an exemption to which he was entitled.

The decision in *Gutknecht* does not control this case. Here, the district court expressly found that placing petitioner into a delinquency status in no way accelerated his order to report for induction. Indeed, it found that just the opposite was true—that had petitioner followed the directives of the board, he would have been ordered to report for induction by November 15, 1966, nearly eight months before the date when he finally failed to report (July 11, 1967) (Pet. App. 8a).[9]

Petitioner relies upon *United States* v. *Fox*, 454 F.2d 593 (C.A. 9). In that case, a different panel of the Ninth Circuit ruled an induction order based on delinquency status invalid whether or not induction was in fact accelerated. The panel reasoned that since the defendant had not taken a physical, only his delinquent status enabled the local board to order his induction. *Id.* at 594.[10]

This analysis is faulty and, as the court in *Fox* itself admitted, the result "does not seem * * * a desirable

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[9] Citing *United States* v. *Dobie*, 444 F. 2d 417 (C.A. 4), petitioner asserts that the district court, on remand, employed faulty reasoning and relied upon insufficient evidence in reaching its factual finding that his induction was not accelerated (Br. 47–48). However, that factual question is not properly before this Court, since petitioner did not raise it in his motion under 28 U.S.C. 2255 (R. 1–8). Furthermore, petitioner offers no theory as to why he should be permitted to relitigate on collateral attack this factual finding made after a full hearing and confirmed on direct appeal.

[10] The facts in *Fox* were quite similar to those involved in the instant case. As here, the defendant had been declared delinquent by his local board after failing to appear for a physical. Like petitioner, he was ordered inducted pursuant

case." 454 F.2d at 595. *Gutknecht* does not mean that a declaration of delinquency provides immunity from induction or that the Selective Service System has no power to declare a registrant a delinquent for any purpose. To take an obvious example, the Selective Service System continues to have power to send a notice of delinquency to a registrant prior to referring a case to the Department of Justice for prosecution, in order to ensure that the registrant is aware of his default and in order to give him an opportunity to correct it.

Similarly, the declaration of delinquency here did not serve to punish, but only to abate the requirements of 32 C.F.R. (1967 ed.) 1631.7 prior to the issuance of the induction order. Unlike Gutknecht, petitioner's order for induction was not accelerated because of his delinquency. Moreover, he did not lose his opportunity to have a physical examination prior to induction; the examination, under the applicable procedures, would have been given at the induction

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to 32 C.F.R. (1967 ed.) 1631.7(a) and subsequently failed to report.

Petitioner also cites *Battiste* v. *United States*, 428 F.2d 801 (C.A. 5), as holding that a prior declaration of delinquency automatically renders an induction order invalid under *Gutknecht*. Insofar as the Fifth Circuit accepted that position in *Battiste*, we believe it to be in error. However, the court in *Battiste* appeared to ground its decision not on a *per se* rule that delinquency-based induction orders are always invalid, but on a determination that the declaration of delinquency had accelerated the defendant's induction at least two months and had prejudiced him by precluding consideration of a requested deferment. See 428 F.2d at 802.

station prior to induction. (Finding 8 of the District Court, Pet. App. 8a.)

The decision in *Fox* is not consistent with *Gutknecht*. As the Court made clear in *Gutknecht*: "There is no doubt concerning the propriety of the * * * criminal sanction [for failure to report for induction], for Congress has specifically provided for the punishment of those who disobey selective service statutes and regulations in § 12 of the Military Selective Service Act * * * " (396 U.S. at 299). No distinction should be made between those who do and those who do not report for physical examinations. In truth, as the district court accurately observed on remand in this case (Pet. App. 9a–10a), the only reason petitioner had no pre-induction physical was his own failure to appear for one. It is strange logic indeed to hold that petitioner's own dereliction should immunize him from criminal prosecution for failing to comply with a valid order of his local board. There is no reason to extend *Gutknecht* that far, since the considerations that made the delinquency regulations invalid as applied to Gutknecht are totally absent from their application in this different factual context to petitioner.

B. NOT EVERY TECHNICAL DEFECT IN AN INDUCTION ORDER IS A DEFENSE TO A PROSECUTION FOR REFUSING INDUCTION

In the seminal case of *Estep* v. *United States*, 327 U.S. 114, this Court held that defects in the administrative process leading to an induction order could be raised as a defense upon indictment for refusing induction. The rationale of that decision was clear: "We cannot believe that Congress intended that crim-

inal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Id.* at 121. Thus in *Estep* this Court fashioned a judicial rule that actions of the local board were subject to judicial review—albeit a limited form of review—in the context of a prosecution for refusing induction. "We are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused." *Id.* at 122.

But the rule of *Estep* does not require that every defect in the board's actions, no matter how trivial and no matter how unrelated to significant procedural or substantive rights, be available as a defense. This Court, in the exercise of its review functions, has recognized that even errors of a constitutional magnitude may be harmless and thus may not warrant reversal. See *Harrington* v. *California,* 395 U.S. 250; *Chapman* v. *California,* 386 U.S. 18.

The courts of appeals have long recognized that this same principle applies in the Selective Service context. Thus, in *United States* v. *Lawson,* 337 F. 2d 800 (C.A. 3), the defendant claimed that his order to report for civilian work was, contrary to the regulations, signed by means of a rubber stamp. The court rejected the claim. "Absent some showing of prejudice to appellant due to the failure on the part of the Board to comply with the formal procedural directive of a regulation, an order of the Board, otherwise within its power to issue, will not be invali-

dated." *Id.* at 812. To the same effect see *United States* v. *Sturgis*, 342 F. 2d 328 (C.A. 3), involving failure to comply with an executive order to post the names of advisers conspicuously in the office of the local board. "The failure to so comply by the Board must be coupled with prejudice to the appellant in order to reach that result." *Id.* at 331. The same test has been applied to claimed defects in the order of call, a claim closely analogous to petitioner's. See *United States* v. *Gast*, 457 F. 2d 141, 144 (C.A. 7); *United States* v. *Camara*, 451 F. 2d 1122, 1125 (C.A. 1). In the latter case, the court held that the presence on the call list of persons listed after the defendant but who should have been called before him was not a defense. The court found that the defendant was high enough on the call list to have been called in any event and that therefore he was not prejudiced.

The error claimed in this case did not prejudice petitioner in any way. Hence, even if the delinquency regulations are deemed an administrative creation having no congressional sanction, petitioner suffered no injury as a result of being placed in an unauthorized category. This is not a case in which "Selective Service * * * [exercised] freewheeling authority to ride herd on [a registrant] using immediate induction as a disciplinary or vindictive measure" (396 U.S. at 306). This is instead a case in which petitioner, having persistently failed to perform his duties under the act, was finally ordered for induction later than he would have been had he lived up to his obligations under the act.

II

THE ALLEGED ERROR IN PETITIONER'S CONVICTION IS NOT SUBJECT TO COLLATERAL REVIEW BY MEANS OF A SECTION 2255 MOTION

The Section 2255 motion in this case was properly denied by the courts below because it fails to allege the type of claim that properly gives rise to an occasion for collateral review of a conviction. The ends of justice are not served by allowing a final judgment of conviction to be reopened in a case such as this, in which the issue presented is not one of constitutional dimensions and the original proceedings afforded a full and fair opportunity for the petitioner to advance his claims.[11]

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[11] Pointing to the principle that collateral attack may be barred by failure to raise an issue in the original proceedings (*Sunal* v. *Large*, 332 U.S. 174; see also cases cited at Annotation, 10 A.L.R. Fed. 724, 733 at § 3(a)) and the statement of the court of appeals that petitioner's Section 2255 motion was properly denied because it raised issues that had already been litigated in the earlier proceeding (see cases cited at Annotation, *supra*, 10 A.L.R. Fed. at 775, § 11(a)), petitioner discerns a "Kafkaesque dilemma where he is damned if he does and damned if he does not" (Pet. Br. 30, n. 17). We agree with petitioner that he may be placed in no worse position for having raised the issue than he would have been in had he failed to avail himself of the opportunity to raise it; insofar as the court of appeals' opinion may be read to suggest a contrary conclusion, we think that it is not consonant with this Court's holding in *Sanders* v. *United States*, 373 U.S. 1. The relevant inquiry in this case is not whether the issue was actually dealt with in the prior litigation (so long as petitioner was afforded a full and fair opportunity to present his claims, as he was here), but whether it is the kind of claim as to which Section 2255 confers an opportunity for a second litigation.

The dominant and recurrent theme of petitioner's brief is that since *United States* v. *Fox, supra,* was a change in the law not limited to prospective application, that change in the law should extend to him. We do not wish to engage in a jurisprudential quibble over whether the *Fox* case represents "new" law, erroneous law, or simply the position of a particular panel of the Ninth Circuit on an issue not definitively resolved.[12] Even if *Fox* is "new law," and even if, contrary to our argument in Part III, *infra,* it should be retroactively applied, that is not the end of the inquiry here. For there is a separate and independent issue that must be faced in this proceeding—whether the subject matter of petitioner's motion falls within the scope of the collateral relief available under 28 U.S.C. 2255. If it does not, the district court cannot grant the motion, regardless of whether "new law" was promulgated in *United States* v. *Fox* and regardless of whether the *Fox* decision was in fact correct. Examination of this issue demonstrates that petitioner's motion does not fall within the scope of Section 2255 or of the traditional writ of *habeas corpus.*

In *Fay* v. *Noia,* 372 U.S. 391, 414 this Court referred to *habeas corpus* as a writ available to correct "criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable." The same basic standard applies to proceedings under Section 2255. *Kaufman* v. *United*

[12] Had *Fox* been decided prior to petitioner's appeal from his conviction, it seems clear that a different panel of the Ninth Circuit would not thereby have been bound to reverse petitioner's conviction.

States, 394 U.S. 217, 221–222; see also *Hill* v. *United States*, 368 U.S. 424, 426–428. Dissenting in *Sunal* v. *Large*, 332 U.S. 174, Mr. Justice Frankfurter attempted to classify those cases in which the writ is available. The post-criminal-conviction categories, none applicable here, were (*id.* at 185–186):

1. Conviction by a court lacking jurisdiction of the person or the offense.

2. Conviction under an unconstitutional statute.

3. Violation by the court of specific constitutional rights (Justice Frankfurter listed double jeopardy, self-incrimination, and lack of indictment by a grand jury.)

4. Legality of sentence or conditions of confinement.

Justice Frankfurter noted in this connection that jury panel, trial procedure, and evidentiary matters do not afford grounds for collateral relief except in flagrant cases (which, presumably, would approach or amount to deprivation of the due process right to a fair trial). During the nearly 27 years that have passed since *Sunal*, this Court has not expanded the list, although the types of constitutional claims falling within the third category enumerated above have outstripped the limited enumeration made by Justice Frankfurter.

Indeed, this Court has never assayed with precision the scope of the writ, nor of Section 2255. The most recent text is *Kaufman* v. *United States*, 394 U.S. 217, in which it was said that "'[t]he course of decisions of this Court * * * makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas even though imposed pursuant to the conviction of a federal court

of competent jurisdiction'" (*id.* at 222).[13] The Court was at pains to emphasize the importance of the distinction between constitutional claims and those of lesser dimension for the availability of collateral review (*id.* at 223).[14] Petitioner's claim, as will be discussed more fully below, is manifestly not based on deprivation of constitutional or even statutory rights and is therefore not cognizable in a post-conviction proceeding.

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[13] Although most of the many court of appeals decisions on Section 2255 do not advance a general theory as to its scope, the holdings of the cases are predominately in accord with this test, and the occasional departures from it are unexplained. See, for instance, the cases discussed in footnote 21, *infra*. In *Lothridge* v. *United States*, 441 F.2d 919 (C.A. 6), the court, in following the widely recognized rule that entrapment cannot be raised under Section 2255, observed that "no issue of constitutional dimensions being presented, the issue of entrapment cannot be raised on collateral attack under Section 2255." *Id.* at 922. In *DeMaro* v. *Willingham*, 401 F.2d 105, 106 (C.A. 7), the court said: "[A]s in the case of a writ of habeas corpus, where as here, there is jurisdiction of the crime charged and of the person indicted, the sufficiency of the indictment is not subject to collateral attack and deficiencies of proof or alleged errors of law must assume constitutional proportions before they can be considered." See also, *Genovese* v. *United States*, 378 F.2d 748, 749 (C.A. 2); *Rosecrans* v. *United States*, 378 F.2d 561, 566 (C.A. 5).

[14] We cite this portion of the Court's discussion not because it was specifically addressed to the issue presented by the instant case—the nature of the subject matter cognizable in a Section 2255 motion—but because it reflects the general importance to that issue of the distinction between constitutional claims and other types of claims. The discussion by the Court was a product of the need to distinguish *Kaufman* from the procedurally analogous case of *Sunal* v. *Large*, 332 U.S. 174, with respect to the availability of collateral relief as to an issue not litigated on direct appeal of the conviction.

The policy reasons which underlie the narrow scope traditionally accorded to relief on habeas corpus have been eloquently argued elsewhere and need not be repeated at length here. See, *e.g.*, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); cf. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965).

Among the policies that underpin the general principle of finality of judgments is the desire to put matters of dispute conclusively to rest. While this consideration has different force in the civil and criminal contexts, it is in basic harmony with the goals of deterrence and rehabilitation embodied in the criminal justice system:

> No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that subsequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.[18]

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[18] *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 262 (Mr. Justice Powell, concurring); *Sanders* v. *United States*, 373 U.S. 1, 25 (dissenting opinion of Mr. Justice Harlan).

Of great practical importance is the fact that collateral review proceedings drain community legal resources, including judges, prosecutors, appointed defense counsel and even courtrooms:

> Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention. To the extent the federal courts are required to reexamine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.[16]

Additionally, because collateral attack may be long delayed, it is frequently difficult to determine with reliability the factual issue giving rise to the attack. And, although a successful attack generally entitles the defendant only to a retrial, a long delay can make another trial impossible. Overall, as Mr. Justice Jackson pointed out, selectivity must be the watchword; otherwise, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U.S. 443, 537.

Petitioner does not deny the traditional limitation of collateral attack to constitutional claims or directly contend that the reach of Section 2255 should now

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[16] *Schneckloth*, *supra*, 412 U.S. 260–261 (Mr. Justice Powell, concurring; footnotes omitted).

be expanded. Rather, he simply states that '[redacted] is too late in the day to assert that *Gutknecht* v. *United States* * * * is not a constitutional holding" (Pet. Br. 31). This assertion is in part a play on words, for in some sense every decision of a federal court is a constitutional holding—rendered by a constitutional court, interpreting and applying statutes and regulations whose ultimate source of legitimation must reside in the fundamental legal charter of our community. But for the purpose of delineating the scope of the writ of *habeas corpus*, the term "constitutional" should not be treated as a synonym for "legal."

Thus, the decision in *Gutknecht* is no more a "constitutional holding" in the sense here relevant[10a] than would be a decision reversing a regulatory agency's denial of a rate increase or the NLRB's determination that certain conduct constituted an unfair labor practice. What is necessary to invoke the court's jurisdiction under Section 2255 is the presentation of a claim that the statute petitioner was convicted of violating was unconstitutional or that the procedures leading to the conviction deprived him of a fundamental constitutional right.

This does not necessarily mean, however, that persons whose induction had been wrongfully accelerated because of delinquency and whose convictions had become final before the *Gutknecht* decision was rendered would not be able to obtain relief under Section 2255.

[10a] We suggest, moreover, that the focus should be on *Fox*, not *Gutknecht*, since the former represents the first holding that an order of the kind petitioner disobeyed was invalid.

Although the Court decided *Gutknecht* on the ground of invalidity of the delinquency regulations as applied under the statute, the Court's opinion makes it clear that it was concerned about the constitutional ramifications of using the threat of military induction as a punitive sanction to enforce the regulations of the Selective Service System. These constitutional issues are both procedural (the lack of full hearing procedures prior to the imposition of the sanction of acceleration) and substantive (the use of the threat of military service as a punishment, particularly in a factual setting implicating First Amendment values)." If a defendant convicted for failing to honor an accelerated induction order based upon delinquency status could make out such a constitutional case in a Section 2255 hearing, he would be entitled to relief.

Petitioner has failed to make out a case that his conviction was contrary to the fundamental law of the Constitution. He has been convicted under the terms of a valid statute making it a criminal offense to refuse to comply with an induction order. The induction order was one that, in the factual circumstances of this case, the Selective Service System was and is empowered by the Congress to issue. Petitioner

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[11] *Gutknecht* involved a registrant who had surrendered his registration certificate and notice of classification as a protest against the Vietnam war. In *United States* v. *O'Brien*, 391 U.S. 367, this Court held that Congress could make similar conduct criminal although it was intended as "symbolic speech." A different constitutional issue is presented as to whether Congress could by statute provide that such conduct would be punished by immediate induction into the armed services.

alleges no inadequacy in the judicial procedures that led to his conviction or in the subsequent extensive review of that conviction. The fact that Selective Service was, after *Gutknecht,* able to order for induction persons in petitioner's position by changing its regulations to provide for an induction order without a physical examination [18] demonstrates that petitioner's claim is not of constitutional or even statutory dimensions, but relates merely to the technical administrative procedures used by the Selective Service System to deal with the situation presented by a registrant who fails to appear for a pre-induction physical.

An argument petitioner might make for the constitutional content of his Section 2255 petition is one he makes only by implication—that he has, unfairly and without good reason, been treated differently from other defendants in the Ninth Circuit whose cases have been controlled by the decision in *United States* v. *Fox.* Petitioner does not present this contention as a full blown equal protection argument—such an argument would create significant difficulty for practices as venerable as this Court's certiorari jurisdiction—but he repeatedly asserts his right to benefit from the Ninth Circuit's "new law".[19]

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[18] This was accomplished by amending 32 C.F.R. 1631.7 to provide that a registrant who fails to report for a physical examination may be ordered to report for induction without a physical examination.

[19] Our observation in our supplemental memorandum in opposition to the first petition for certiorari that "the conflict is an intra-circuit one, and presumably will be resolved by the

Incongruities in treatment of litigants raising similar contentions are presented whenever a rule is held not to be retroactive. As the Court observed in *Jenkins* v. *Delaware*, 395 U.S. 213 at 217-218:

> In short, petitioner's concern for what he refers to as "visible imperfection[s] in a judicial process" merely highlights the problem inherent in prospective decisionmaking, *i.e.*, some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected. Thus, raising the spector of potential anomalies does not further the difficult decision of selecting the precise event that should determine the prospective application of a newly formulated constitutional principle.

Although the "change in law" resulting from the *Fox* decision does not transmute petitioner's claim into one of constitutional dimensions, it is clear that the *Fox* case is at the core of petitioner's argument and that he would not claim entitlement to relitigation of the claims rejected in his original appeal, in the

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Ninth Circuit itself * * *" (Memo. in Opp., p. 2) was an observation of fact and did not suggest that the Ninth Circuit should use this particular case to resolve the conflict, or, indeed, suggest that if the conflict should cease to be of continuing importance, the Ninth Circuit was obligated to resolve it. Indeed, the burden of our argument here is that, after petitioner's conviction became final, his case could not be used to resolve the conflict.

absence of the later case, *even if his claim were valid on the merits and had been erroneously rejected in the earlier proceedings.* We submit, however, that the contention that there has been a change in the law introduces a red herring into the analysis of the issue here presented, which is whether the subject matter of petitioner's claim is cognizable in a Section 2255 proceeding. The answer to that question cannot properly turn on whether the claim is a meritorious one, otherwise there would be no limit on the kinds of claims that would have to be considered (quite independently of any "change in law").[20] This leaves only the possibility that meritorious claims that have subsequently been judicially accepted constitute fit subject matter for such proceedings. Manifestly, however, even this narrow description does not truly relate to or characterize *subject matter.*

Moreover, if the Court were disposed to carve out a new class of Section 2255 proceedings coming within such a "change in law" category, it should do so only with full awareness of the confusion and uncertainty that will arise because of the difficulty in many cases of determining when a "change in law" has occurred. Would there have been a sufficient "change" if *Fox* had been decided by some circuit other than the Ninth? If not, would it suffice to show that the *Fox* result had been reached by two or three (or even all) other circuits? If petitioner's conviction had become final

[20] Conversely, petitioner clearly is not entitled to relief merely by showing a subsequent contrary decision, without regard to the merits of his claim and the correctness of that subsequent decision.

before *Gutknecht* was decided by this Court, would that decision have constituted a sufficient change to open the Section 2255 forum? (The Court will recall in this connection the considerable difficulties encountered in dealing with the retroactivity of *Katz* v. *United States*, 389 U.S. 347, which turned upon the question of when *Olmstead* v. *United States*, 277 U.S. 438, had actually been overruled. See *Desist* v. *United States*, 394 U.S. 244).

In sum, we suggest that the "change" resulting from *Fox* merely demonstrates a greater likelihood that petitioner's arguments at the time of his original conviction had merit and were incorrectly rejected. But unless the Court is going to throw open the doors to collateral attack on the basis of any material meritorious claim, regardless of subject matter, the contention that there has been a "change in law" should not make a claim cognizable which by its nature may otherwise not be raised in a Section 2255 proceeding.

The courts of appeals have generally recognized that Section 2255 does not exist in order to provide a continuing forum to adjudicate the impact, if any, of each new decision on all past convictions. Thus, in *Meyers* v. *United States*, 446 F.2d 37 (C.A. 2), the court, in holding that the allegedly erroneous giving of an "Allen" charge to the jury could not be raised under Section 2255, quoted at length from *United States* v. *Sobell*, 314 F.2d 314, 324–325 (C.A. 2), certiorari denied, 374 U.S. 857:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court, indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" 332 U.S. at 182, 67 S. Ct. at 1593, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. * * * When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All this is the wisdom behind the doctrine that limits collateral attack on criminal judgment.

Nothing in the decisions of this Court suggests a contrary conclusion. Petitioner relies heavily on the statement in *Sanders* v. *United States,* 373 U.S. 1, 17, that "[i]f purely legal questions are involved, the application may be entitled to a new hearing upon showing an intervening change in the law." But that language is not directed to the question of identifying the types of issues that are within the scope of Section 2255, but to the question of the circumstances in which, as to a matter *within the scope* of Section 2255, the

court should rehear a claim. It is in the later context that Judge Wright stated in dissent in *Thornton* v. *United States,* 368 F. 2d 822, 831 (C.A.D.C.), quoted by this Court in *Kaufman* v. *United States,* 394 U.S. 217, 230, that Section 2255 relief should be available "if new law has been made." [21]

Petitioner also relies on the implication of *Sunal* v. *Large,* 332 U.S. 174, and dictum in *Estep* v. *United States,* 327 U.S. 114, 124. In *Sunal,* this Court held that failure to raise an issue on direct appeal barred habeas corpus relief, stating that if the issue had been raised on appeal, as it was by petitioner here, then a different question would be presented as to the availability of collateral relief. The contention in *Estep*

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[21] Similarly, the court of appeals decisions relied on by petitioner for their language do not support his position. All but one involve allegations that constitutional rights were violated in the process of convicting the petitioner. In *Tucker* v. *United States,* 427 F. 2d 615 (C.A.D.C.), the petitioner alleged that incriminating statements had been introduced at his trial which were the product of an illegal arrest, an illegal period of detention, made without counsel after indictment and were involuntary—allegations of violations of the Fourth, Fifth and Sixth Amendments. In *Alford* v. *State of North Carolina,* 405 F. 2d 340 (C.A. 4), petitioner alleged that his guilty plea had been coerced by the statutory threat of a death penalty, a violation of the Fifth and Sixth Amendments. In *Gray* v. *United States,* 407 F. 2d 830 (C.A. 5), the allegation was a denial of the right of confrontation under the Sixth Amendment. *Vanhook* v. *Craven,* 419 F. 2d 1295 (C.A. 9), involved a claim that a stipulation of guilt had been submitted to the trial court without the consent of the petitioner, a violation of the Fifth and Sixth Amendments. Only *Brough* v. *United States,* 454 F. 2d 370 (C.A. 7), holding that the construction of a statute of limitations could be raised under Section 2255, involves a collateral attack on non-constitutional grounds. We submit that *Brough* was wrongly decided.

and *Sunal* was that all members of Jehovah's Witnesses are ministers and therefore were exempt from service under the statute. Section 5(d) of the Act then in effect, 50 U.S.C. App. (1946 ed.) 305(d), provided that "[r]egular or duly ordained ministers of religion" were exempt from training and service. The convicting court in *Sunal* had held that the application of the exemption to petitioners could not be advanced as a defense to a charge of refusing induction.

Although the opinions in *Estep* and *Sunal* are not entirely clear, they appear to be grounded on an assumption that the interests at stake in the context of an induction order are constitutionally so great as to entitle persons subject to an induction order to a judicial hearing on a claim that the statute exempts them from induction. Absent such a judicial hearing, their position would be constitutionally comparable to that of a person sentenced to imprisonment without an opportunity for a judicial hearing on his liability to imprisonment. Had the defendants in *Sunal* pursued their available judicial remedy—an appeal—and still been denied a judicial forum to hear their claim of exemption, then they would arguably have been entitled to a *habeas corpus* hearing so that they might have one judicial forum in which the issue could be tried. Not only does petitioner here advance no such statutory claim, but he has not been denied a judicial forum in which to advance the claim he now makes. To the contrary, he has had such a forum, his claim has been advanced, and it has been denied on the merits.

Because petitioner's motion fails to allege a denial

of fundamental constitutional rights or the denial of a full and fair opportunity to advance his claim at trial or upon direct appeal, it does not state a claim subject to collateral relief under 28 U.S.C. 2255.[22] Therefore, his motion was properly denied by the courts below.

III

EVEN IF THE FOX DECISION IS CORRECT, IT SHOULD NOT BE APPLIED RETROACTIVELY

If the Court concludes, contrary to our argument in Part II, *supra*, that the type of claim presented by petitioner is subject to collateral review, and if it further concludes, contrary to our argument in Part I, *supra*, that the decision in *United States* v. *Fox*, *supra*, is correct, there remains the question whether the *Fox* decision should be applied retroactively, and, if it should, whether such retroactive application should extend back to persons whose convictions have become final.

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[22] We do not contend that the courts are absolutely foreclosed from granting collateral relief in any case, no matter how unjust the result, in which a specific allegation of constitutional error is not advanced. While the Court need not reach the question for purposes of the disposition of this case, there may be instances in which a claim, although based on statute or judicial rule, entails "exceptional circumstances" in which the granting of collateral relief would be within the historic scope of *habeas corpus*. See *Sunal* v. *Large*, *supra*, 332 U.S. at 187 (Frankfurter, J., dissenting). Whatever may be the contours of such an exception to the general principles outlined in the foregoing argument (and it may well be that such cases are in fact no exception, but actually represent instances of due process claims arising out of the manner of application of statute or rule), this is clearly not a case falling within them.

Petitioner seems to suggest that consideration of this issue should turn largely on the retroactivity of *Gutknecht*,[23] "since *Fox* is simply an application of *Gutknecht* to a species of delinquency processing * * *" (Pet. Br. 34–35).[24] We do not find ourselves "hard pressed" (*id.* at 35) to distinguish between the two cases for purposes of retroactivity analysis. On the contrary, the controlling policy considerations that underlie the largely pragmatic retroactivity inquiry suggest to us that the reasons for applying *Gutknecht* (and *Oestereich*) retroactively to registrants who were *punished* for delinquency (which, moreover, took the form of conduct having overtones of expression of political views) by improper acceleration of induction or denial of a

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[23] Of course, the precise question of the application ("retroactive" or otherwise) of *Gutknecht* to petitioner was at the heart of the original litigation in his case.

[24] In many of the cases cited by petitioner as holding *Gutknecht* retroactive, the finding of retroactivity was premised upon the registrant's induction having been accelerated—as petitioner's was not. See *Bradley* v. *Laird*, 449 F. 2d 898 (C.A. 10); *Bruce* v. *United States*, 448 F. 2d 21 (C.A. 4); *United States* v. *Kelly*, 314 F. Supp. 500 (E.D. N.Y.); *Foster* v. *United States*, 320 F. Supp. 646 (D. Conn.); *United States* v. *Rumon*, 315 F. Supp. 1126 (W.D. Pa.). In the rest, the courts did not indicate whether their holdings of retroactivity were based upon acceleration in fact. See *Andre* v. *Resor*, 443 F. 2d 921 (C.A. 9); *Zack* v. *Benson*, 454 F. 2d 596 (C.A. 9); *Swarts* v. *United States*, 3 SSLR 3424 (C.D. Cal.); *Akeson* v. *United States*, 4 SSLR 3430 (D. Colo.); *Kittrell* v. *United States*, 4 SSLR 3439 (N.D. Fla.); *Mikesell* v. *United States*, 3 SSLR 3390 (W.D. Mich.). To the extent that the latter decisions, like *Fox*, applied *Gutknecht* where the delinquency regulations had no punitive effect on the registrants, we believe they were wrongly decided.

statutorily conferred exemption dictate precisely the opposite result in the case of a registrant who has willfully sought to impede the functioning of the Selective Service System and now seeks to rely on a highly technical argument in no way premised on any denial to him of substantial rights. We submit, therefore, that *Fox*, if it is accepted, should be entirely prospective in application—*i.e.*, applied only to cases arising out of induction orders issued after the date of the decision. If it is to be afforded any retroactivity, it should not extend back to final convictions.

Fox does not fit within the rule of *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, relied upon by petitioner (Br. 37). The Court there held that the decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, were retroactive as applied to forfeiture proceedings because those cases "dealt with the kind of conduct that cannot constitutionally be punished in the first instance." 401 U.S. at 723. Distinguishing other retroactivity decisions, the Court continued: "In the case before us, however, even the use of impeccable fact-finding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment." *Id.* at 724. See also *Robinson* v. *Neil*, 409 U.S. 505, 509.

This case stands on an entirely different footing. No rule of constitutional magnitude was articulated in *Fox*; it simply purported to interpret administrative regulations. Petitioner to the contrary notwithstanding, *Fox* was not a case in which the defendant was

convicted of a charge for which he could not be "constitutionally punished in the first instance." Compare *U.S. Coin & Currency, supra,* 401 U.S. at 723.

There are no retroactivity procedents of this Court directly controlling the instant case. However, in numerous decisions this Court has delineated the several factors which must be considered in determining whether rulings should be applied retroactively or prospectively. In *Stovall* v. *Denno,* 388 U.S. 293, 297, the Court listed the three controlling considerations: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. See, *e.g., Linkletter* v. *Walker,* 381 U.S. 618, 629, 636; *Tehan* v. *Shott,* 382 U.S. 406, 410–418; *Johnson* v. *New Jersey,* 384 U.S. 719, 726–727; *Michigan* v. *Payne,* 412 U.S. 47, 55; *Gosa* v. *Mayden,* 413 U.S. 665. In addition to applying these criteria to constitutional rulings, this Court has deemed them relevant to decisions grounded on statutory interpretation. See *Fuller* v. *Alaska,* 393 U.S. 80, 81.

Desist v. *United States,* 394 U.S. 244, 249, teaches that the "purpose" criterion is the most important. We submit that the "purpose" of *Fox* does not require its retroactive application. The thrust of that decision was to implement the *Gutknecht* ruling by invalidating all induction orders issued to registrants under the delinquency regulations, regardless of whether the regulations were being employed in a punitive fashion. In so doing, the court assumed that *Gutknecht* had invalidated the delinquency regulations on their face

rather than, as we here contend, invalidating them only in their application to persons in Gutknecht's situation. The court acted as it did not because it thought it unjust to punish Fox for his misconduct, but because it thought its decision necessary to compel regularity of administrative procedures by the Selective Service System and because it desired to avoid embroiling the courts in the factual inquiry as to whether acceleration had actually taken place in each individual case. The first of these objectives is fully served by prospective-only application of the *Fox* decision; the second justifies retroactive application only as far back as trials not yet conducted (the degree of retroactivity afforded *Miranda* by *Johnson* v. *New Jersey, supra*).

The contrast with *Gutknecht* and *Oestereich* is illuminating. The principal "purpose" of those decisions (and *Estep* as well) was to ensure that registrants were afforded the full protection of the statutory scheme of Congress in the administration of the draft laws. No comparable interest is at stake here. Neither petitioner nor Fox was deprived of any statutory right or suffered any detriment as a result of the application of the delinquency regulations.

The *Fox* court may have assumed that a registrant was prejudiced by being placed in a delinquency status because he was thus subject to induction without physical examination. But this is just not so. Had Fox or petitioner reported for induction, they would in fact then have been given physical examinations to determine their inductability. It is thus wholly unfounded to suggest that Fox or petitioner suffered any

injury or unfairness by reason of their delinquency. Indeed, the court realized that *Fox* had suffered no real injustice and that the result it reached did "not seem to be a desirable one" (454 F.2d at 595). It reversed his conviction almost apologetically, noting that "we did not write * * * the regulations, and the defect in them" (454 F.2d at 596).

The decision in *Fox* is thus hardly comparable to a decision placing limitations on the jurisdiction of a military forum (*O'Callahan* v. *Parker*, 395 U.S. 259) or affirming the right to a jury trial in state criminal prosecutions (*Duncan* v. *Louisiana*, 391 U.S. 145, and *Bloom* v. *Illinois*, 391 U.S. 194). Yet in both those instances the Court, adopting a pragmatic approach to the question and focusing upon achievement of the ends of justice, found the rules non-retroactive because the previous procedures had not significantly undermined the truth-determining process.[25] It would be wholly incongruous with this line of cases if a different rule were applied in the circumstances here.

Although the remaining factors—reliance and burden on the administration of justice—have been regarded as having controlling significance "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity" (*Desist* v. *United States*, 394 U.S. 244, 251), those considerations also support the nonretroactivity of *Fox*.

The Selective Service System, in referring persons for indictment in this situation, has relied upon a rea-

[25] As to the non-retroactivity of *O'Callahan*, see *Gosa* v. *Mayden*, 413 U.S. 665; as to the non-retroactivity of *Duncan* and *Bloom*, see *DeStefano* v. *Woods*, 392 U.S. 631, 633.

sonable belief that induction orders issued to delinquents while 32 C.F.R. (1967 ed.) 1631.7 was in effect were valid under *Gutknecht* if the delinquency declaration had not been used by the local board to punish the registrant. If *Fox* were applied retroactively to void the convictions of defendants like petitioner who also refused to take physicals, the five year statute of limitations (18 U.S.C. 3282) would preclude the reindictment of some (including petitioner) for the alternative offense of failing to appear for a physical. "Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved." *Gosa* v. *Mayden, Supra,* 413 U.S. at 685.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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JOSEPH ANTHONY DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF[1]

I.

Petitioner's constitutional right to due process was violated by the issuance of the induction order.

The government, while first asserting that this Court's decision in *Gutknecht* v. *United States*, 396 U.S. 295 (1970), was *not* a "constitutional holding" (Brief for the United States, pp. 14-15, 31), then admits that

[1] Petitioner's counsel regret that it was impossible to submit this Reply Brief earlier, and respectfully advise the Court that the Government's Brief, due on January 28, 1974, was not received until February 19, 1974, 22 days late. (At petitioner's counsel's request, the Solicitor General's Office did serve a non-final typescript on February 12, 1974, 15 days late.) For the reason cited, pursuant to Rule 40(c), leave of the Court is respectfully requested to receive this Reply Brief.

> "... the Court's opinion [in *Gutknecht*] makes it clear that it was concerned about the *constitutional ramifications* of using the threat of military induction as a punitive sanction to enforce the regulations of the Selective Service System. These *constitutional* issues are both procedural (the lack of full hearing procedures prior to the imposition of the sanction of acceleration) and substantive (the use of the threat of military service as a punishment, particularly in a factual setting implicating First Amendment values). If a defendant convicted for failing to honor an accelerated induction order based upon delinquency status could make out such a constitutional case in a Section 2255 hearing he would be entitled to relief."

Brief for the United States, p. 32 (emphasis added).

While, as shown immediately *infra*, this recognition by the government is highly supportive of petitioner's claims, it also demonstrates the legally myopic interpretation of the *Gutknecht* decision under which the government has been erroneously laboring.

Gutknecht nowhere implied, as the government seems to suggest, that the touchstone for the invalidation of a delinquency induction was the reason for the delinquency. If, in fact, the basis for the delinquency was a registrant's exercise of arguably protected activity, he may of course have additional grounds for complaint. See, e.g., *Wolf* v. *Selective Service*, 372 F.2d 817 (2d Cir. 1967). But, more importantly, the decision in *Gutknecht* was, bottomed on the total absence of *any* statutory authority for the entire delinquency schema. Mr. Justice Douglas, speaking for the court, clearly denominated *Gutknecht* as one of those

classes of constitutional cases, dealing with "the liberties of the citizen." 396 U.S. at 306-307, citing *Kent* v. *Dulles*, 357 U.S. 116, 128-129 (1958).[2]

Petitioner submits that *Gutknecht* is solidly in the constitutional tradition of cases such as *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 553 (1935); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Zemel* v. *Rusk*, 381 U.S. 1, 22 (1965); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Schneider* v. *Smith*, 390 U.S. 17 (1968); and *Kent* v. *Dulles*, *supra*, all of which protect the liberties of the citizenry from unauthorized overreaching by the executive department.

Selective Service boards are creatures of statute. The exercise of the regulatory authority must be delimited by these underlying statutes. What petitioner here complains of is not merely the violation of a "technical" regulation, but, rather, the absence of any jurisdictional authority for the issuance of his induction order. Simply stated, the order was issued under a regulatory scheme heretofore held totally invalid in *Gutknecht*. As the Ninth Circuit observed in *United States* v. *Fox*, 454 F.2d 593 (1971), but for the delinquency regulations in existence at the time

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[2] In *Kent* v. *Dulles*, *supra*, 357 U.S. at 120, this Court cited *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420-430 (1935), where Mr. Chief Justice Hughes clearly explicated the constitutional basis for invalidation of agency action because of excessive and standardless delegation of legislative authority. If the government is at a loss to ascertain the constitutional inhibitions which were violated by the unauthorized promulgation of the delinquency regulations, the answer is provided by the reminder in *Panama Refining Co.* that under Article I, §§1 and 8, legislative power is vested exclusively in Congress. As Chief Justice Hughes observed:

"... there are limits of delegation which there is no constitutional authority to transcend." 293 U.S. at 429.

of the offense in question here, and later invalidated in *Gutknecht*, registrants such as Davis could not be inducted. 454 F.2d at 595. Concededly, the only answer prior to the amendment to 32 C.F.R. 1631.7 was to prosecute for the underlying regulatory violation which in this case, as in *Peet* v. *United States*, 399 U.S. 523 (1970), was a failure to report for a physical examination.[3]

Thus, petitioner's claim is that he cannot be deprived of his liberty in the absence of any *valid* regulatory authority therefor. His constitutional demand is predicated upon this simple constitutional requirement stemming from the *Gutknecht* decision.

Neither was *Gutknecht* primarily concerned with particular procedural due process issues under the delinquency regulations as the government seems to imply in an effort to deprecate the breadth of that decision's constitutional basis. See, *United States* v. *Kelly*, 314 F. Supp. 500, 509 (E.D.N.Y. 1970). It was only in reference to the government's proffered theory, astoundingly reasserted here, see p. 21, Brief for the United States, that inductions should be substituted for prosecutions in order to further the aims of the Selective Service Act, see p. 47, Brief for the United States in *Gutknecht* v. *United States*, No. 71, Oct. T. 1969, that the Court dealt with the subject of the absence of procedural due process from delinquency procedures. 396 U.S. 307-308.

There is thus no question but that *Gutknecht* is a decision based upon constitutional due process commands, and that

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[3] It is to be noted that the right to purge one's regulatory transgressions extends up to the time of trial. See 50 U.S.C. §454(a); 32 C.F.R. 1642.2 (1968). Indictment thus does not mean that the Armed Services are deprived of the registrant's assistance. This has been consistent Department of Justice policy in most federal jurisdictions.

even under the standards advanced by the government *supra*, petitioner is entitled to reversal, because "his conviction was contrary to the fundamental law of the Constitution."[4]

II.

Petitioner's claims are cognizable in a proceeding under 28 U.S.C. §2255.

As to this issue the government also concedes partial error on the part of the Court below. Brief for the United States, p. 25 n. 11.[5]

Much of the analysis of the government in its brief regarding the instant issue is predicated upon the correctness of its initial assumption, discussed in Point I, *supra*, that *Gutknecht* is not a decision reaching constitutional dimensions. See p. 31, Brief for the United States.

Whatever the government's theories as to retroactivity may be, two critical factors are now clear. First, the government recognizes that the *Fox* decision,

> "...demonstrates a greater likelihood that petitioner's arguments at the time of his original conviction had

[4] Page 32, Brief for the United States.

[5] The government indeed appears, in footnote 11, to confess error and to dissociate itself from the totally inconsistent ruling below in *Davis III* that the intervening change of law cannot be considered on a Section 2255 application because of notions of law of the case. Yet, elsewhere in its Brief (p. 39), the government inconsistently urges that one of the reasons why relief should be denied to petitioner is that he has previously advanced the same claim on direct appeal "and it has been denied on the merits."

merit and were incorrectly rejected." (Page 36, Brief for the United States.)[6]

Second, the government's arguments generally regarding retroactivity notwithstanding, the Ninth Circuit itself has accorded *Fox* retrospective application. See, *Zack* v. *Benson*, 454 F.2d 596 (1971).[7] Nowhere in its brief does the government seek to explain the effect of the *Zack* case upon petitioner. Cf. also, *Peet* v. *United States, supra.* Obviously, at least one panel of the Ninth Circuit has determined that claims such as petitioner's are cognizable via a §2255 motion.

Finally, even if the government's initial premise, that *Fox* and *Gutknecht* are cases based merely on statutory interpretation, has any merit, petitioner is nevertheless entitled to relief, because:

> "At no time has [this Court] denied retroactive application to a *statutory* interpretation which would invalidate a prior conviction."

Brough v. *United States*, 454 F.2d 370, 372 (7th Cir. 1972).

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[6] Notwithstanding this concession, on p. 36, and indeed the further concession that petitioner's was a "material meritorious claim", the government argues on p. 35 that the change in law which converted petitioner's claim into one possessing material merit is a "red herring", because §2255 relief should not be granted even to a meritorious claim. This is an amazing tour de force because elsewhere in the Brief (pp. 29-30), the government vigorously urges the policy reasons for narrowing post-conviction relief to embrace only meritorious applications.

[7] A copy of the Statement of Facts, extracted from Zack's brief in the Ninth Circuit, is set forth as an Addendum to this Reply Brief.

Furthermore, it has traditionally been held that where a court of supreme jurisdiction renders an act non-criminal, as did this Court in *Gutknecht* vis a vis that petitioner's refusal of induction, retrospective application has always been the rule. *United States* v. *United States Coin and Currency*, 401 U.S. 715 (1971); *Rosecrans* v. *United States*, 378 F.2d 561, 566 (5th Cir. 1967). *United States* v. *Kelly*, *supra* at 505.

CONCLUSION

For all of the foregoing reasons, the conviction should be reversed and the indictment ordered dismissed.

Respectfully submitted,

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ADDENDUM

No. 71-1304

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CHARLES ZACK,

Appellant,

vs.

CHARLES BENSON,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANT'S OPENING BRIEF

I.

Statement of Facts

Petitioner's Selective Service file [Petitioner's Exhibit 1] discloses that on May 2, 1968, the Petitioner was classified I-A and was ordered to report for a physical examination on June 13, 1968. Petitioner failed to report for that examination and, subsequently, returned both his classification and registration cards to his local board. On August 12, 1968, Petitioner was declared delinquent I-A.

An order for medical interview was mailed to Petitioner on August 23, 1968; the interview was to be held on August 30, 1968. Petitioner failed to attend this medical interview. Additionally, on August 23, 1968, a Delinquency Notice, advising Petitioner of the declaration of delinquency of August 12, 1968, was mailed.

On October 7, 1968, a notation was made in Petitioner's Selective Service file reading: "Delinquent Order for Induction." On October 21, 1968, defendant was ordered to report for induction on November 12, 1968. Petitioner reported to the induction station but refused to process for induction.

Petitioner was subsequently convicted by a jury and was sentenced to a forty-two (42) month term for violation of the Military Selective Service Act of 1967 (refusal to be inducted in violation of 50 U.S. Code App. 462). Such sentence was delivered on July 28, 1969, by the Honorable Judge Manuel Real.

Defendant sought discharge under a motion pursuant to 28 U.S.C. 2255. Such motion was denied by Judge Manuel Real, United States District Court Judge, on the 16th day of November 1970. Subsequently, Petitioner was placed on parol from Safford Prison on recommendation of the Board of Parol. However, he remains in custody for the purpose of 28 U.S.C. 2255.

It is from the denial of the motion pursuant to 28 U.S.C. 2255 that Petitioner appeals.

II.

Statement of the Issues

1. Does the record indicate that automatic reversal is required under *Gutknecht* v. *United States*, 396 U.S. 295?

2. Does Petitioner's failure to attend preinduction physical allow his Selective Service Board authority to call for defendant's induction without following Selective Service Regulations?

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DAVIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1454. Argued February 26, 1974—Decided June 10, 1974

After being declared a delinquent, petitioner was ordered to report for induction pursuant to Selective Service regulations, which permitted the ordering of a declared delinquent to report for induction even though he had not been found acceptable for military service. When petitioner did not report as ordered, he was prosecuted and convicted for failure to report for induction. Following a remand by the Court of Appeals for reconsideration in the light of the intervening decision of this Court in *Gutknecht* v. *United States*, 396 U. S. 295, the District Court concluded that *Gutknecht* did not affect the conviction, and the Court of Appeals affirmed. While petitioner's petition for certiorari was pending in this Court, the Court of Appeals decided *United States* v. *Fox*, 454 F. 2d 593, wherein, on the authority of *Gutknecht*, that court reversed a conviction based on facts virtually identical to those on which petitioner's conviction was based. This Court subsequently denied certiorari in the petitioner's case. After beginning his sentence, petitioner brought this collateral proceeding under 28 U. S. C. § 2255, asserting that the Court of Appeals in the *Fox* case had effected a change in the law of the Ninth Circuit after affirmance of his conviction and that the holding in *Fox* required that his conviction be set aside. The District Court summarily denied relief. The Court of Appeals affirmed on the ground that because petitioner had unsuccessfully litigated the *Gutknecht* issue on direct review, the court's earlier affirmance was "the law of the case" and precluded petitioner from securing relief under § 2255 on the basis of an intervening change in law. *Held:*

1. Even though the legal issue raised in a prior direct appeal from petitioner's conviction was determined against petitioner,

Syllabus

he is not precluded from raising the issue in a § 2255 proceeding "if new law has been made . . . since the trial and appeal." *Kaufman* v. *United States*, 394 U. S. 217, 230. Pp. 8–9.

2. The fact that petitioner's claim is grounded "in the laws of the United States" rather than in the Constitution does not preclude its assertion in a § 2255 proceeding, particularly since § 2255 permits a federal prisoner to assert a claim that his confinement is "in violation of the Constitution *or laws* of the United States." *Sunal* v. *Large*, 332 U. S. 174, distinguished. Pp. 9–10.

3. The issue that petitioner raises is cognizable in a § 2255 proceeding. Pp. 10–11.

472 F. 2d 596, reversed and remanded.

STEWART, J., delivered the opinion for the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed a concurring and dissenting opinion. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-1454

Joseph Anthony Davis, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 10, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law. While the question presented is a relatively narrow one, it arises as the result of a rather complicated chain of events.

I

In February of 1965, the petitioner, Joseph Anthony Davis, was classified I-A by his draft board and ordered to report for a pre-induction physical examination. Davis failed to appear on the appointed date. He later informed his local board that his failure to report was due to illness. Although the board attempted to arrange a second date for the pre-induction physical, its attempts to communicate with the petitioner were frustrated by his failure to keep the board apprised of his correct mailing addresses. As a result, the local board's communications to the petitioner were returned to the board stamped "addressee unknown," and Davis again failed to report for the physical. In December of 1965, the board sent the petitioner a warning that it was considering

declaring him a delinquent because of his failure to report for the second pre-induction physical.[1] This communication was also returned to the board stamped "addressee unknown."

After another unsuccessful attempt to communicate with the petitioner, the local board declared him a delinquent, pursuant to 32 CFR § 1642.4 (a) (1967 ed.),[2] both because of his failure to report for the second pre-induction physical and because of his failure to keep the local board informed of his current address.[3] At the same time the board mailed the petitioner a delinquency notice. Shortly after the delinquency declaration, the board sent the petitioner an order directing him to report for induction into the armed forces. Once again, the order was returned to the board stamped "addressee unknown." Several months later, the board sent the petitioner a second order to report for induction. This time the order was mailed to a St. Paul, Minnesota address

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[1] The notice informed the petitioner that his local board was "considering declaring you a delinquent." It further stated that "[a] delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants."

[2] This regulation, which was rescinded shortly after our decision in *Gutknecht* v. *United States*, 396 U. S. 295 (1970), provided in pertinent part:

"(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction . . . or the duty to comply with an Order to Report for Civilian Work . . ., the local board may declare him to be a delinquent."

[3] 32 CFR § 1641.4 imposes a duty on every registrant to report for an armed forces physical examination at the time and place fixed in the order mailed to the registrant by the board. 32 CFR § 1641.1 imposes a duty on every registrant "to keep his local board currently informed in writing of . . . the address where mail will reach him . . . ."

that Davis had used when requesting a duplicate draft card. Although there was no indication that Davis did not receive the induction order, he once again failed to report as ordered. This second failure to report for induction resulted in the petitioner's prosecution and conviction under 50 U. S. C. App. § 462 (a).[4]

At the time that the local board issued the second induction order, 32 CFR § 1631.7 (a) (1967 ed.) provided that registrants could be ordered to report for induction only after they "[had] been found acceptable for service in the Armed Forces and . . . the local board [had] mailed [them] a Statement of Acceptability . . . at least 21 days before the date fixed for induction." Since, at the time of his induction order, Davis had not yet appeared for a physical examination to determine his acceptability, quite obviously neither one of these requirements was satisfied. The regulation, however, went on to provide "[t]hat a registrant classified in Class I–A or Class I–A–O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability . . . ." The only other registrants similarly excepted from these prerequisites were those who had volunteered for induction. In light of this proviso, the local board

[4] 50 U. S. C. App. § 462 (a) provides, in pertinent part, that "any person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or of rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." 32 CFR § 1641.5 imposes a duty on every registrant "to report for induction at the time and place ordered by the local board."

evidently concluded that the preconditions to induction stated in § 1631.7 (a) were inapplicable to the petitioner, whom it had earlier declared to be a delinquent, and that it was thus free to issue an induction order to the petitioner.[5]

Davis appealed his conviction to the Court of Appeals for the Ninth Circuit. While that appeal was pending, this Court announced its decision in *Gutknecht* v. *United States*, 396 U. S. 295 (1970). In *Gutknecht* a selective service registrant's induction had been accelerated because his local board had declared him a delinquent.[6] When he failed to report for induction as ordered, he was prosecuted and convicted under 50 U. S. C. App. § 462. The delinquent registrant's accelerated induction was ordered in accordance with another portion of 32 CFR § 1631.7 (a) that, like the provision applicable to Davis, called for exceptional treatment for registrants whom a local board had declared delinquent. Local boards were authorized by 32 CFR § 1642.4 to issue a declaration of delinquency "[w]henever a registrant . . . failed to perform any duty or duties required of him under the selective service law," other than to report as ordered for induction or for civilian work. Both Davis

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[5] Both induction orders sent to the petitioner had the word "Delinquent" typed on the face. The local board's "Minutes of Action" also reflect that the petitioner was ordered to report "as Del."

[6] 32 CFR § 1631.7 (1967 ed.) established an order in which registrants who were eligible would be called for induction. A registrant's place in this order of call was determined by several factors, including age and marital status. If a registrant were declared a delinquent under 32 CFR § 1642.4 (1967 ed.) he immediately entered the first priority in the order of call and was ordered to report for induction even ahead of volunteers for induction. In this sense, the registrant's induction was "accelerated" as a result of the local board's delinquency declaration.

and the registrant in *Gutknecht* were declared delinquent on the authority of § 1642.4.[1] In *Gutknecht*, the Court held that the selective service regulations that accelerated the induction of delinquent registrants by shifting them to the first priority in the order of call were punitive in nature and, as such, were without legislative sanction.[2] Accordingly, the Court concluded that the registrant could not be prosecuted for failure to comply with an induction order issued pursuant to these regulations.

After *Gutknecht*, the Court of Appeals remanded the petitioner's case to the District Court "without limitation of scope but especially for consideration . . . in the light of the intervening decision of *Gutknecht* v. *United States*." 432 F. 2d 1009 (CA9 1970). On remand, the District Court, after conducting a hearing, concluded that the petitioner's induction had not been accelerated because of his delinquency status and that *Gutknecht* therefore did not affect his conviction.[3] On appeal, the Court of Appeals affirmed. 447 F. 2d 1376.

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[1] The registrant in *Gutknecht* had been declared a delinquent for failing to have his registration certificate and current classification notice in his possession at all times, as required by 32 CFR §§ 1617.1 and 1623.5, respectively.

[2] In this regard, the Court said:

"The power under the regulations to declare a registrant 'delinquent' has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not congenial to our law-making traditions . . . We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized . . . . If federal or state laws are violated by registrants, they can be prosecuted. If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed." 396 U. S. 306–307.

[3] At the hearing in the District Court, the executive secretary of the local board testified that the petitioner would have been inducted earlier if he had not failed to appear for the physical. In

While Davis' subsequent petition for certiorari was pending in this Court, the Court of Appeals for the Ninth Circuit decided *United States* v. *Fox*, 454 F. 2d 593. The circumstances leading to Fox's induction order were virtually identical to those in the petitioner's case. Like Davis, "Fox was declared delinquent by his Selective Service Board . . . for his failure to appear for pre-induction physical examinations as ordered . . . ." 454 F. 2d 593. Prior to receiving his induction order, "Fox . . . was never found to be 'acceptable for service' and he was [not] mailed a Statement of Acceptability . . . at least 21 days before his induction date . . . ." "[T]hus the only authority the local board had for its order to Fox to report for induction was the provision of § 1631.7 (b)[10] for delinquents to be called without a previous finding of acceptability or the mailing of a State of Acceptability 21 days before induction." 454 F. 2d, at 595. This was the same regulation on which the board's induction order to Davis had been predicated.

At Fox's post-*Gutknecht* trial for failure to report for induction, "the government offered evidence . . . to show that Fox's induction order was not accelerated by the declaration of delinquency." "The trial judge found no acceleration and convicted." 454 F. 2d, at 593–594. The Court of Appeals for the Ninth Circuit reversed Fox's conviction on the authority of *Gutknecht*. The court

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corroboration, the Government introduced the local board's "delivery lists" showing the induction dates of other registrant's at the local board. The District Court found that if the petitioner had complied with the local board's procedures and "[h]ad . . . not been declared a Delinquent, he would have been ordered to report for induction on or before November 15, 1966," which would have been nearly eight months before he finally failed to report (July 11, 1967).

[10] Between the dates of the induction orders of Davis and Fox, the provisions of 32 CFR § 1631.7 (a) (1967 ed.) were incorporated into 32 CFR § 1631.7 (b) (1969 ed.).

held that "Fox's induction was accelerated by the declaration of delinquency as a matter of law [because] [w]ithout the declaration, the Board could not have ordered him to report for induction." *Id.*, at 594. Thus, the court concluded "that the [induction] order . . . was illegal and created no duty on Fox's part to report for induction." *Id.*, at 595.

In his Supplemental Memorandum In Opposition to Davis' petition for certiorari, the Solicitor General conceded that "the holdings in *Fox* and in [*Davis*] are inconsistent," but nevertheless urged the Court to deny certiorari in that "the conflict is an intra-circuit one [to] be resolved by the Ninth Circuit itself . . . ." Supplemental Memorandum for the United States in Opposition, p. 2. We denied Davis' petition for certiorari. 405 U. S. 993.

After an unsuccessful attempt to secure a rehearing in the Court of Appeals, Davis was remitted to federal custody to commence serving his three-year sentence. He then instituted the present collateral proceeding under 28 U. S. C. § 2255, which permits "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." In his § 2255 motion, Davis asserted that the Court of Appeals for the Ninth Circuit had in the *Fox* case effected a change in the law of that circuit after the affirmance of his conviction, and that its holding in *Fox* required his conviction to be set aside. The District Court summarily denied the petitioner's motion.[11] On appeal, the Court of Appeals

[11] At the time of his § 2255 motion in the District Court, Davis also moved under F. R. Cr. P. 35 for reduction or modification

affirmed without considering the merits of the petitioner's claim on the ground that "[t]he decision on the direct appeal is the law of the case," and that therefore any "new law, or change in law" resulting from its decision in *United States* v. *Fox* would "not [be] applied in this circuit under the circumstances such as here presented." 472 F. 2d 596. Because the case presents a seemingly important question concerning the extent to which relief under 28 U. S. C. § 2255 is available by reason of an intervening change in law, we granted certiorari. — U. S. —.

II

The sole issue before the Court in the present posture of this case is the propriety of the Court of Appeals' judgment that a change in the law of that circuit after the petitioner's conviction may not be successfully asserted by him in a § 2255 proceeding.[12] Thus, our inquiry is confined to the availability of a § 2255 proceeding for the resolution of Davis' claim to relief from his conviction.

Because the petitioner had unsuccessfully litigated the *Gutknecht* issue on direct review, the Court of Appeals held that its earlier affirmance was "the law of the case" and precluded the petitioner from asserting on collateral attack his claim that its *Fox* decision had subsequently changed the law of the Ninth Circuit on that issue. In this Court, the Solicitor General's brief concedes that the

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of his sentence. This motion was taken under advisement by the District Court and was thereafter granted in part. As a result, the petitioner was released from incarceration after having served four months of his three-year sentence, and he was placed on probation for the remainder of the original term.

[12] In the absence of a decision by the Court of Appeals on the merits of the petitioner's contentions, this case is not an appropriate vehicle to consider whether the *Gutknecht* decision has retroactive application or whether the *Fox* case was correctly decided by the Court of Appeals.

opinion of the Court of Appeals in this regard "is not consonant with this Court's holding in *Sanders* v. *United States*, 373 U. S. 1." [13] In *Sanders*, the Court held, *inter alia*, that even though the legal issue raised in a § 2255 motion "was determined against [the applicant] on the merits on a prior application," "the applicant may [nevertheless] be entitled to a new hearing upon showing an intervening change in the law . . . ." *Id.*, at 17. The same rule applies when the prior determination was made on direct appeal from the applicant's conviction, instead of in an earlier § 2255 proceeding, "if new law has been made . . . since the trial and appeal." *Kaufman* v. *United States*, 394 U. S. 217, 230 (1969). Thus, the Court of Appeals erred in holding that "the law of the case," as determined in the earlier appeal from the petitioner's conviction, precluded him from securing relief under § 2255 on the basis of an intervening change in law.

Nevertheless, the Solicitor General contends that we should affirm the judgment of the Court of Appeals because the petitioner's claim is not "of constitutional dimension" and thus is not cognizable in a § 2255 collateral proceeding. At the outset, we note that the Government's position finds scant support in the text of § 2255, which permits a federal prisoner to assert a claim that his confinement is "in violation of the Constitution *or laws* of the United States." (Emphasis added.)

It is argued forcefully in a dissenting opinion today that this language, which appears in the first paragraph of § 2255, is somehow qualified by the third paragraph of the statute, which provides:

> "If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or

[13] Brief for the United States, p. 25 n. 11.

> infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

The dissent rejects any suggestion that the language concerning "sentence[s] . . . otherwise open to collateral attack" can encompass a claim that a confinement under that sentence violates the "laws of the United States," contending that this would reduce the remaining language regarding "a denial or infringement of constitutional rights" to surplusage. Indeed, the nub of the dissent is that § 2255 "does not speak of an illegal *'confinement'* . . . or even of an illegal *conviction*, but rather of illegal *sentences*." *Post*, at 6. (Emphasis original.) Although this microscopic analysis of § 2255 surely shows that the statutory language is somewhat lacking in precision, the resulting shadow that the dissenting opinion would cast over the statute totally disappears in the light of its legislative history.

That history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus. As the Court pointed out in *United States* v. *Hayman*, 342 U. S. 205, 219 (1952), the "history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another more convenient forum." Thus, there can be no doubt that the grounds

for relief under § 2255 are equivalent to those encompassed by § 2254, the general federal habeas corpus statute, under which relief is available on the ground that "a person is in custody . . . in violation of the Constitution *or laws* or treaties of the United States." (Emphasis added.) Furthermore, although the dissent derides the view that the words "otherwise open to collateral attack" are intended to be "a catch-all phrase," *post*, at 8, the legislative history fully supports that view. In recommending to Congress what eventually became § 2255, the Judicial Conference Committee on Habeas Corpus Procedure stated that "[t]he motion remedy broadly covers all situations where the sentence is 'open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus." [14]

No mircoscopic reading of § 2255 can escape either the clear and simple language of § 2254 authorizing habeas corpus relief "on the ground that [the prisoner] is in custody in violation of the . . . laws . . . of the United States" or the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect. Thus, we cannot agree that the third paragraph of § 2255 was in any fashion designed to mark a retreat from the clear statement that § 2255 encompasses a prisoner's claim of "the right to be released upon the ground that the sentence was imposed in violation of the Constitution *or laws* of the United States." Accordingly, we conclude that the text of the statute cannot sustain the Government's position that only claims "of constitutional dimension" are cognizable under § 2255.

Moreover, there is no support in the prior holdings of this Court for the proposition that a claim is not cognizable under § 2255 merely because it is grounded in the "laws of the United States" rather than the Constitution.

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[14] *United States* v. *Hayman*, 342 U. S. 205, 217 (1952).

It is true, of course, that in *Sunal* v. *Large*, 332 U. S. 174 (1947), the Court held that the nonconstitutional claim in that case could not be asserted to set aside a conviction on collateral attack. But *Sunal* was merely an example of "the general rule . . . that the writ of habeas corpus will not be allowed to do service for an appeal." *Id.*, at 178. "Appeals could have been taken in these cases but they were not." *Id.*, at 177. The Court was careful to point out that "if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." *Id.*, at 181. Moreover, "[t]he case [was] not one where the law was changed after the time for appeal had expired." *Ibid.* Thus, *Sunal* cannot be read to stand for the broad proposition that nonconstitutional claims can never be asserted in collateral attacks upon criminal convictions.[15] Rather, the implication would seem to be that, absent the particular considerations regarded as dispositive in that case, the fact that a contention is grounded not in the Constitution but "in the laws of the United States" would not preclude its assertion in a § 2255 proceeding.

This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U. S. 424, 429 (1962), for example, we held that "collateral relief is not available when all

[15] Although *Sunal* held that a federal prisoner could not assert a nonconstitutional claim on collateral attack if he had not raised it on appeal, the Court there recognised that this rule would not bar the assertion of *constitutional* claims in collateral proceedings even if the applicant had failed to pursue them on appeal. 332 U. S., at 178–179, 182. Cf. *Kaufman* v. *United States*, 394 U. S. 217, 223 (1969).

that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.*, at 428 (internal quotations omitted). The Court did not suggest that any line could be drawn on the basis of whether the claim had its source in the Constitution or in "the laws of the United States."

In this case, the petitioner's contention is that the decision in *Gutknecht* v. *United States*, *supra*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well-taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255. Therefore, although we express no view on the merits of the petitioner's claim, we hold that the issue he raises is cognizable in a § 2255 proceeding.

The judgment of the Court of Appeals is accordingly reversed and the case is remanded for further proceedings consistent with this opinion.

SUPREME COURT OF THE UNITED STATES

No. 72-1454

Joseph Anthony Davis, Petitioner, v. United States.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 10, 1974]

MR. JUSTICE POWELL, concurring and dissenting.

I agree with the Court's holding that review under 28 U. S. C. § 2255 is available to petitioner, due to the intervening change in the law of the circuit. But I would dispose of the case finally, not remand it.

Petitioner's case turns on whether his conviction for refusing induction has been invalidated by *Gutknecht* v. *United States*, 396 U. S. 295 (1970). Both parties have raised, briefed and argued this issue, and it is properly before us. We should, in the interest of judicial economy if for no other reason, decide the *Gutknecht* issue and bring to an end this lengthy litigation, rather than remand it to the Court of Appeals for that court's fourth round of consideration.

In my view, petitioner's reliance upon *Gutknecht* is misplaced. Petitioner reads *Gutknecht* as invalidating the former delinquency regulations of the Selective Service System in every possible application.[1] He espouses a *per se* rule under which any induction order that derived from an application of those delinquency regulations is illegal. *Gutknecht* does not have such a broad sweep.

[1] *Gutknecht* concerned primarily 32 CFR § 1642.13 (1969), now superseded, which assigned first priority in the order of induction to delinquents. That regulation is not at issue here.

In *Gutknecht*, the registrant was declared a delinquent for failing to retain his registration and classification papers in his possession at all times. He had surrendered these papers in an act of protest against the Vietnam conflict. As a consequence of the delinquency declaration, he was rushed—indeed if might be said railroaded—to induction. The entire process lasted less than two months, and Gutknecht was issued an induction order on the day after Christmas, only six days after he had been declared a delinquent. He was deprived of his standing in the order of call and was truly "accelerated" in that he was ordered to induction prior to the date on which he would have been called if treated in the normal manner. Gutknecht, in essence, was caught up in the tide of punitive actions by the Selective Service System in the late 1960's against those who were thought to be evading military service because of opposition to the Vietnam conflict.

The Court's opinion in *Gutknecht* repeatedly refers to this deliberately punitive attitude of the Service and its use of the then prevailing delinquency regulations as a means, short of criminal prosecution, for dealing with such persons. See, *e. g.*, 396 U. S., at 306–308. But I do not read *Gutknecht* as overturning the former delinquency regulations in all circumstances, or as depriving Boards of a reasonable and effective alternative procedure for dealing with recalcitrant registrants who plainly were seeking to avoid military service. If the stated rationale of the holding in *Gutknecht* is accepted, that case invalidated those regulations only insofar as they were applied punitively to advance the date of a registrant's induction or to deprive him of procedural rights that he had not waived. See *United States* v. *Dobie*, 444 F. 2d 417 (CA4 1971). The reasons relied upon by the Court in *Gutknecht* and in the concurring opinion

of MR. JUSTICE STEWART, 396 U. S., at 314, are incompatible with a *per se* rule proscribing all Board authority to order an evasive registrant to report for induction. Thus, in my view *United States* v. *Fox*, 454 F. 2d 593 (CA9 1971), on which Davis relies, is incorrectly decided.

In the instant case it is undisputed that Davis was not, as a result of being declared delinquent, ordered to report for induction at a point in time prior to the normal order of his call. Indeed, due to the Board's patient efforts to deal with Davis' repeated attempts to obstruct the induction process, Davis was ordered to report for induction some seven months later than would have been the case if the process had been allowed to function normally. There is no hint of vindictiveness or of an attempt to punish Davis.

The only impact on Davis of being declared delinquent, other than a *delay* in the issuance of an order to report for induction, was that the declaration of delinquency permitted the Board under then prevailing regulations to issue an induction order in the absence of a preinduction physical examination and of the resulting form letter notifying Davis of his acceptability for service.[2] Davis attempts to portray these preconditions

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[2] Under 32 CFR § 1631.7 (1967), which has been withdrawn, the Board could issue induction orders to those classified I–A or I–A–O who had been (i) found acceptable for service and (ii) mailed a statement of acceptability at least 21 days before the date fixed for induction, provided:

"That a registrant classified in Class I–A or Class I–A–O who is delinquent may be selected and ordered to report for induction . . . notwithstanding the fact that he has not been found acceptable for service . . . and has not been mailed a Statement of Acceptability . . . ."

Davis received his induction notice under this regulation. Davis maintains that *Gutknecht* invalidated the above proviso clause, thus depriving the Board of the power to induct him in the absence of a finding of acceptability (*i. e.*, a preinduction physical) and a

on induction as significant procedural rights of which he was unfairly deprived by the Board. The argument is frivolous. Davis frustrated every effort of the Board over a period of more than two years to accord him the right to a physical examination. Thus he waived the procedural rights on which he now seeks to rely. Moreover, he would have received such an examination in any event if he had reported for induction. And the form notifying a registrant of acceptability for service is hardly a matter of major moment, particularly to one who had long been on notice of the pendency of an induction order.

On the record in this case, no one could seriously contend that Davis was the victim of punitive action or that he was not treated with tolerance and forbearance. In my view, the Court in *Gutknecht* could hardly have intended to invalidate an induction order in such circumstances.

I would affirm the judgment.

Statement of Acceptability. But, as noted, *Gutknecht* dealt with punitive treatment of delinquents, not all treatment of such registrants. Moreover, the above regulation was not at issue in *Gutknecht*.

SUPREME COURT OF THE UNITED STATES

No. 72-1454

Joseph Anthony Davis, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 10, 1974]

MR. JUSTICE REHNQUIST, dissenting.

The Court today holds, with a minimum of discussion, that petitioner, in a proceeding under 28 U. S. C. § 2255, may raise his claim that his induction into the Armed Forces was accelerated contrary to the principles of *Gutknecht* v. *United States*, 396 U. S. 295 (1970). The Court reaches this result despite the fact that a United States District Court and the Court of Appeals for the Ninth Circuit previously considered this contention in light of *Gutknecht* and concluded that petitioner's induction had not in fact been accelerated. As a justification for the decision this Court suggests that a § 2255 motion is both permissible and appropriate because a panel of the Court of Appeals for the Ninth Circuit has rendered a subsequent decision which adopts a new legal test for determining whether acceleration has occurred and which, if applied to petitioner, would probably change the outcome of his case. Since I believe the Court's decision is justified neither by the language of § 2255 itself nor by any prior case decided by this Court, and since I believe the potential consequences of the decision are harmful to the administration of justice, I dissent.

I

The Court's conclusion, discussed *infra*, that claims such as petitioner's can be raised on a § 2255 motion, is

actually unnecessary for the disposition of this case. The decisions of the District Court and the Court of Appeals rested entirely on application of a "law of the case" theory, a position that the Government now disavows and that the Court disposes of in a single paragraph. The petitioner in his petition for certiorari and in his brief on the merits principally addressed that issue and his sole rebuttal of the Government's contention that nonconstitutional attacks on judgments of conviction are not cognizable in § 2255 proceedings is contained in his reply brief where he devotes one paragraph to arguing that his claim *is constitutional*. Thus the Court reaches out to decide a highly important issue without the benefit of lower court attention to the question without full briefing, and, in my view, without full examination of the issues involved. It would seem preferable to remand this case, as the Court does anyway, without deciding this issue, allowing further consideration of the question below and leaving our venture into this area for a more appropriate occasion. Since the Court declines to do so, however, I will also address the broader question to which the Court proceeds.

II

The facts of this case are set out in detail in the Court's opinion. I review them here briefly only to emphasize the extent of both administrative and judicial consideration which petitioner has received. A mere recounting of the facts dispels the notion that there are any equities whatever in support of petitioner's claim for relief.

Petitioner's difficulties with the Selective Service System began in February of 1965 when he was classified I-A by his local draft board. At that time he was ordered to report for a pre-induction physical examination, but did not appear on the specified date. The board then attempted to schedule another physical but was frustrated

by petitioner's failure to advise the board of his whereabouts. At this point the board warned petitioner that he was in danger of being declared a delinquent, but this warning was also returned with the notation "addressee unknown."

The board made one more unsuccessful attempt to communicate with petitioner and then declared him a delinquent according to the regulations then in effect.[1] After a brief interval the board then mailed petitioner, not a third notice to report for a physical examination, but rather a notice to report for induction. This order having been returned stamped "addressee unknown," the board followed up by sending petitioner a second notice to report for induction which he apparently received. He did not report, however, and was then prosecuted for this refusal.

All parties to this case concede that Selective Service registrants who are not declared delinquents are not mailed orders of induction before they have taken a physical examination. Without the delinquency classification, which allowed the board to issue an induction order without having given a physical examination, the board would have been faced with one of two alternatives. It could have prosecuted the petitioner for failure to take the physical examination or, alternatively, it could have continued the obviously futile mailing of additional notices concerning the physical. The delinquency procedure enabled the board to bypass those two undesirable options, and, in effect, provided for a temporary waiver of the examination until the time stated in the induction order. It should be noted that this procedure does not allow the board to *induct* anyone without a physical ex-

[1] The particular regulation relied upon by the board was 32 CFR § 1642.4 (a) (1967 ed.), which was rescinded after the Court's decision in *Gutknecht*, *supra*.

amination; rather it simply allows the board to *call* persons for induction prior to the time an exam is given.[2]

Having been convicted in the District Court, petitioner took a direct appeal to the Court of Appeals for the Ninth Circuit. While the appeal was pending in that court, however, this Court decided *Gutknecht, supra*, and the Court of Appeals then remanded the case to the District Court for further consideration in light of our decision. On remand, the District Court decided that *Gutknecht* did not apply because petitioner's induction had not in fact been accelerated.[3] The court also found that "[d]efendant's substantial rights were not prejudiced by the Local Board's ordering him to report for induction without first giving him a physical examination and sending him a Notice of Acceptability,"[4] because "[t]he failure to give such an examination and such Notice of Acceptability were [sic] caused by defendant's own failure to report for physical examination on October 8, 1965, as ordered."[5] The Court of Appeals agreed that *Gutknecht* did not control this case and affirmed.[6] We denied certiorari.[7]

Although one might have supposed the proceedings to be closed at this point, our denial of certiorari marked only the end of phase one. For petitioner, having failed on his direct attack, then sought relief under 28 U. S. C. § 2255, presenting the same claims of acceleration which had previously been rejected. The principal basis for pe-

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[2] The District Court specifically found that petitioner "would have received a complete physical examination prior to induction had he reported on July 11, 1967, as ordered." Petition for certiorari, p. 102.

[3] Petition for certiorari, p. 92.

[4] Petition for certiorari, p. 92.

[5] Petition for certiorari, p. 92.

[6] 447 F. 2d 1376.

[7] 405 U. S. 933.

titioner's motion was that the law of the Ninth Circuit, unfavorable to him at the time of his conviction and appeal, had subsequently been changed in *United States v. Fox*, 454 F. 2d 593 (1971). The District Court denied relief without comment, and the Court of Appeals again affirmed.[8] Stating that "[t]he decision on the direct appeal is the law of the case," [9] that court also noted specifically "that *Fox* does not even suggest overruling *Davis*," [10] and further that "the new law, or change in law, rule is not applied in this circuit under circumstances such as here presented. *Odom* v. *United States, supra*." [11] Again one would suppose that the dispute had reached its end, but this Court today decrees otherwise, remanding it for yet more consideration by the courts below.

III

For reasons that I frankly do not understand, the Court seems to believe that the question of whether claims such as petitioner's may be raised in a motion under § 2255 is either largely settled by § 2255 itself and by earlier decisions of this Court or, perhaps, is too inconsequential to require extended treatment. Neither premise is sound. Both the language of § 2255 and the case law of this Court suggest that the issue is very much in doubt, and the potential consequences of the decision suggest that the matter calls for serious and careful consideration.

In deciding whether claims of this type may be raised in a § 2255 motion, the logical starting place is the statute itself. The Court's opinion, however, gives the statute only a passing nod, apparently believing that ambi-

[8] 472 F. 2d 596.
[9] 472 F. 2d, at 596.
[10] 472 F. 2d, at 596.
[11] 473 F. 2d, at 596.

guity is best resolved by ignoring the source from which it arises. I believe the statute, and the Court's treatment of it, require a closer look.

The Court begins its discussion of the statute by stating: "[W]e note at the outset that the Government's position finds scant support in the text of § 2255, which permits a federal prisoner to assert a claim that his confinement is in violation of the Constitution or *laws* of the United States."[12] (Emphasis in Court's opinion.) This quoted language is taken from the first paragraph of § 2255 which reads:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

That paragraph, however, does not speak of an illegal "*confinement*," as suggested by the Court, or even of an illegal *conviction*, but rather of illegal *sentences*. Furthermore, the paragraph is concerned only with motions for relief, not with the Court's power to grant relief. The power to grant relief is instead governed by the more specific provisions of paragraph three of the statute.

The language of paragraph three differs quite strikingly from the language quoted above. After providing for notice and a hearing in appropriate cases, the paragraph continues:

> "If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed

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[12] *Ante*, at 9.

was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

This language certainly makes less clear the intended scope of paragraph one, since, contrary to the emphasis on "sentences" in the earlier paragraph, the provisions of paragraph three mention "sentences" only once, and then in connection with those "not authorized by law or otherwise open to collateral attack . . . ."[13] More importantly, the paragraph makes no mention of judgments rendered in violation of the *laws* of the United States. Rather the paragraph permits relief only where "there has been such a denial or infringement of the *constitutional* rights of the prisoner as to render the judgment vulnerable to collateral attack . . . ." Thus a district court may grant relief under this section only where (1) the judgment rendered was without jurisdiction; (2) the sentence was not authorized by law or is otherwise open to collateral attack; or (3) there has been such a denial of constitutional rights as to render the judgment vulnerable to collateral attack. Petitioner's case does not even arguably meet any one of these tests: the District

[13] The statute seems, at times, to use the terms "sentence" and "judgment" interchangeably, for paragraph three allows relief from judgments in specified instances while paragraph one would seem to allow attacks only on sentences. But the fact that no distinction is made between the terms in paragraph one does not mean that their contrasting use in paragraph three can automatically be deemed without significance. The Court should attempt to reach a reasonable interpretation based upon the particular context of the statute and the historical background of collateral relief, rather than simply abandoning the statute to study its legislative history.

Court clearly had jurisdiction to render a judgment of conviction; the sentence was concededly within the limits authorized by law and not otherwise vulnerable; and the Court apparently accepts the fact that petitioner has not presented a constitutional claim against the judgment. Nothing in the more generalized reference to "laws of the United States" in the first paragraph of § 2255, therefore, can redeem petitioner's complete failure to bring himself within the operative language of the third paragraph.[14]

The Court, however, strongly suggests that its opinion could rest upon the provision of paragraph three providing relief for "sentence[s] . . . otherwise open to collateral attack." This suggestion only compounds the confusion To begin with, it seems odd that the Court chooses to bypass the language of that same sentence dealing with sentences (rather than judgments) "not authorized by law" since that language far more closely parallels the language from the first paragraph cited by the Court. But, in any event, reading words "otherwise open to collateral attack" as simply a catch-all phrase, including any recognizable ground for upsetting convictions on direct appeal makes it difficult to see why Congress then bothered to include the separate provision allowing relief when "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack . . . ." The Court could not reasonably argue that this provision is intended to give additional protection to constitutional rights because

[14] It might be argued, of course, that the first paragraph of § 2255 was for some reason designed to permit the filing of motions for relief even in some cases where relief could not be granted under paragraph three. But the Court offers no reason, and I can think of none, why Congress would encourage such a futile exercise. What the Court has done is simply to read most of paragraph three out of the statute, apparently assuming that its more specific provisions have no function in a proper interpretation of § 2255.

the Court purports to find no distinction in the statute between constitutional and nonconstitutional attacks on judgments of conviction.

But assuming for the moment that the Court's approach is correct, I find a second obstacle to this decision in the definition, or lack of definition, of the word "laws." For though the Court seems to accept that petitioner has stated a recognizable claim that his sentence was somehow imposed in violation of the laws of the United States, the Court only briefly mentions what law the sentence is thought to be in violation of. Certainly petitioner cannot contend that his sentence under 50 U. S. C. App. 462 (a) for refusing to report for induction is in violation of *that* section. Nor does he point to any other statutory provision which prohibits his incarceration for that offense. Therefore the basis for the claim, as the Court seems to believe, lies somewhere in the holdings of this Court in *Gutknecht* and of the Court of Appeals for the Ninth Circuit in *Fox*. The inclusion of either of these decisions in the category of "laws of the United States" merits some additional attention.

The term "laws of the United States" was included in § 2255 presumably to continue its traditional place in federal habeas corpus statutes.[15] The Habeas Corpus Act of 1867, 14 Stat. 385, gave federal courts the power "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States . . . ." This language was carried forward

[15] Section 2255 was enacted to provide the same relief available under the federal habeas corpus statute without the logistical problems encountered in the latter remedy. *United States* v. *Hayman*, 342 U. S. 205. The Court makes much of this fact in its opinion but then drops the issue without examining what constituted a "law" for purposes of habeas corpus or what the scope of habeas corpus relief has proved to be under the decisions of this Court.

in Rev. Stat. § 752 and now in 28 U. S. C. §§ 2241 (b)(3) and 2254 where the word "law" has been changed to "laws." The same phrasing has now been incorporated into § 2255. But the term's longevity has not brought with it a corresponding judicial elucidation. Like many other issues in the field of habeas corpus, the question seems to have been left for decision on a case-by-case basis.

Certainly a creditable argument could be made that the term "laws" applies only to federal statutes, not to individual decisions of the federal courts. In 1842, for example, only 25 years before the Habeas Corpus Act was passed, this Court stated: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws." *Swift* v. *Tyson*, 16 Pet. 1, 18 (1842).[16] But even if some allowance for judicial lawmaking is made, the question in this case is not settled. For, if the law be *Gutknecht*, then the Court's "new law" argument immediately disappears. Petitioner had a full opportunity to argue the applicability of *Gutknecht* on remand from his first appeal, and both the District Court and Court of Appeals found that it was not controlling. Since that time no decision of this Court has modified *Gutknecht* in any way which would now bring petitioner within its scope. Thus the real focus of petitioner's argument must be that *Fox* is the

[16] The Court in *Swift* v. *Tyson*, *supra*, was considering a section of the Judiciary Act of 1789 which stated, in part: "[T]he laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply." The Court, in explaining its doubt that court decisions constituted "laws" observed: "They are, at most, only evidence of what the laws are, and not of themselves laws. They are often re-examined, reversed and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect." 16 Pet., at 18.

governing law. But in that regard, I cannot see why a decison by a single panel of the Court of Appeals for the Ninth Circuit should be considered a "law" of the United States. In fact the Court of Appeals itself stated that its decision in *Fox* had not overruled *Davis*, pointing out that an en banc decision of the Court of Appeals would be necessary for such a result. Thus the Court today categorizes as a "law of the United States" a decision which is still open to question within the Court of Appeals' own jurisdiction.

The Court gives no indication of where this loose process of definition will end. It would certainly be surprising if a decision of the Court of Appeals for the Fourth Circuit, for example, were sufficient to give prisoners in the Ninth Circuit grounds for a § 2255 motion, but it is not clear to me why a decision of the Fourth Circuit is any less a law of the United States than a decision of the Ninth Circuit. Concededly, it need not be considered binding on the Ninth Circuit, but that is not the concern under § 2255. Nor is it obvious to me what the Court would require a Court of Appeals to do when intracircuit conflicts arise. The decision today would seem to compel the Court to give a defendant already convicted according to one statutory interpretation the benefit of any more liberal interpretation which might emerge. This erratic process of interpretation finds no warrant in § 2255.

IV

The Court's lack of attention to the statutory language in this case is more than matched by the sparsity of the case law it cites. Although the Court seems to accept without question that both relief under § 2255 and habeas corpus relief have long been available to prisoners making nonconstitutional attacks on judgments of conviction, the Court cites not a single case from this Court that

so holds.[17] Certainly neither *Sanders* nor *Kaufman*, the two most significant § 2255 decisions in recent years, is controlling on the important issue presented here, for both decisions involved completely different factual situations and considerations.[18] *Hill* v. *United States*, 368 U. S. 424, a third important case under § 2255 and one cited by the Court in its opinion, would seem to cut against the Court's position. In *Hill* the Court held that

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[17] The Court, in fact, avoids the necessity for a closer look at the statutory language of § 2255 by turning instead to the provisions of the federal habeas statute as a guide. This reliance makes all the more curious the fact that the Court does not support its view of the scope of federal habeas by any convincing citation of authority.

[18] The *Sanders* Court's statement of the issue before it clearly demonstrates how different that case was from the one now under consideration. In *Sanders* the Court said: "We consider here the standards which should guide a federal court in deciding whether to grant a hearing on a motion of a federal prisoner under 28 U. S. C. 2255." 373 U. S., at 2. That issue arises not under paragraph one of § 2255, setting forth the claims which a prisoner might make, or under that part of paragraph three setting forth the grounds on which relief might be granted, but under the language found earlier in paragraph three dealing with when a hearing must be held. Thus, the Court in *Sanders* was faced with the question not of whether a particular type of claim is cognizable *at all* in a § 2255 proceeding but simply whether a hearing is required on a claim concededly within the reach of that section.

The petitioner in *Kaufman*, in contrast to the petitioner here, sought relief on the grounds that he had been subjected to an unconstitutional search and seizure. The Court's recognition of the constitutional tenor of his claim is evident throughout the opinion. For example, the Court clearly stated that "the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial *where constitutional rights are at stake*," 394 U. S., at 225, and that "the provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of *constitutional rights* relating to the criminal trial process requires the continuing availability of a mechanism for relief." 394 U. S., at 228.

a failure to follow the requirements of Fed. Rule Crim. Proc. 32 (a), a rule promulgated under the auspices of a federal statute, was not the type of error which could be raised on a § 2255 motion. The Court stated:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character and magnitude cognizable under a writ of habeas corpus. *It is an error which is neither jurisdictional nor constitutional.* It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an admission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" (Emphasis added.) (Citations omitted.)

The only other case mentioned by the Court which might be relevant to this issue is *Sunal* v. *Large*, 332 U. S. 174, a case like *Hill* in which this Court *denied* relief for a claim with no constitutional foundation. The Court today suggests, by stress on a negative pregnant, that the decision to deny habeas corpus relief in that case was grounded solely on the petitioner's failure to raise his claim on direct appeal and that if the issue had been properly raised, the Court would have reached a different conclusion. It is true, of course, that collateral relief is not to be employed as a substitute for an appeal, and *Sunal* is a leading case for that proposition. But a reading of *Sunal* which recognizes only the effect of failure to appeal is unnecessarily grudging. The Court in *Hill*, for example, although faced with a situation in which the noncompliance with Rule 32 (a) was not raised on appeal, did not imply that the error could have been raised in § 2255 proceedings if an appeal had been taken. Rather

the Court stated flatly: "We hold that the failure to follow the formal requirements of Rule 32 (a) is not of itself an error that can be raised by collateral attack . . . ." 368 U. S. 424.

Although the scope of relief in a habeas corpus proceeding remains largely undefined, probably out of concern that definition would introduce unwanted limitation, the judicial expansion of the federal courts' habeas power had not previously reached the type of claim asserted here. Certainly Mr. Justice Frankfurter's catalogue in *Sunal*, 332 U. S., at 185–186 (dissenting opinion), makes no mention of such grounds. And there is no dearth of authority to the effect that federal habeas corpus is not available merely to correct errors of law.[19] Many decisions of lower federal courts have at least implicitly limited collateral relief to claims of constitutional stature.[20]

The lack of foundation from which the Court now proceeds to fashion a new, expansive collateral relief doctrine unfortunately suggests that the Court is prepared to extend or retract relief on the basis of whether a majority of the Court believes that a particular set of factual circumstances is "exceptional" or that a particular litigant has raised an appealing point. Thus, the petitioner in *Hill* is barred from raising his claim at all in a § 2255 proceeding because failure to comply with an explicit federal rule is "not of itself an error of the character or magnitude cognizable under a writ of habeas corpus." The petitioner in *Sunal* is also barred, despite a "far more compelling" claim that the one raised in *Hill*, see 368 U. S., at 428, apparently because he did not receive a previous rejection of his claim on direct appeal. But petitioner in this case

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[19] See, *e. g.*, *Sunal* v. *Large*, 332 U. S. 174, 179 (1949).

[20] See, *e. g.*, *Demarco* v. *Willingham*, 401 F. 2d 105, 106 (CA7); *Lothridge* v. *United States*, 441 F. 2d 919 (CA6).

succeeds. According to the Court, this case is different for petitioner has already had his precise claim decided against him once, curiously enough a circumstance considered favorable for him, and because "[t]here can be no room for doubt that such a circumstance [conviction for failure to obey a possibly invalid order] 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." It is difficult to see that this process of selection rests upon any reasoned distinctions which may be derived from either the statute or the cases.

V

The Court's rather brief dismissal of the Government's arguments in this case might be understandable were the issues of less importance, or the result less likely to produce severe repercussions. After all, the scope of § 2255 relief has been undefined for almost 25 years and it might be supposed that continuation of this state of affairs would cause no unusual difficulties. But the potential consequences of the Court's decision today make a *laissez-faire* attitude inappropriate. For, "[a]ssuming that there 'exists,' in an ultimate sense, a 'correct' decision of a question of law, we can never be assured that any particular tribunal has in the past made it: we can always continue to ask whether the right rule was applied, whether a new rule should not have been fashioned." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963). Two examples will suffice as illustrations.

(1) This Court occasionally, though not with great frequency, is called upon to resolve conflicts among the Courts of Appeals on nonconstitutional criminal questions. For example, in January of 1974, the Court decided *United States* v. *Maze*, — U. S. — (1974), a case in which we were asked to resolve a conflict among the

Courts of Appeals concerning the circumstances under which fraudulent use of a credit card might violate the federal mail fraud statute. The Courts of Appeals for the Sixth and Tenth Circuits had construed the scope of the statute somewhat more narrowly than five other courts of appeals. In *Maze* we approved the minority approach, agreeing with the Sixth Circuit that the respondent's conviction under the mail fraud statute should be reversed.

The Court's decision today seems to provide full opportunity for all defendants convicted under the Mail Fraud Act in the circuits whose view was not accepted to relitigate those convictions in a § 2255 proceeding. Most of those convictions have received full appellate review, and many defendants had unsuccessfully sought certiorari in this Court. The district courts, faced with this influx of motions, will be faced with the difficult task of sifting through various factual claims to determine if the principles of *Maze* should be applied. I suspect that the burden will not be inconsiderable.

(2) The Court of Appeals for the Ninth Circuit, in affirming the dismissal of petitioner's § 2255 motion, cited to its own decision in *Odom* v. *United States*, 455 F. 2d 159 (1972). That case involved the question of whether the petitioner was entitled to the benefit of *Wade* v. *United States*, 426 F. 2d 64 (1970), a case which had established new law on insanity for the Ninth Circuit. At the time *Wade* was decided the Court of Appeals specifically held that the decision should apply only to "convictions [which] have not become final as of the date of this decision."[21] Under my reading of the Court's opinion in this case, however, petitioner Odom and anyone else who had raised an insanity defense in the Ninth

[21] 426 F. 2d 64, 73–74 (1970).

Circuit may now proceed to file § 2255 motions in the District Court. For Davis' conviction was equally as final as Odom's conviction, and no basis is evident for saying that one decision is less a "law of the United States" than the other.

The effect will be twofold. First, federal courts which are already overburdened with cases will find that burden increased. As Justice Jackson noted in *Brown v. Allen*, 344 U. S. 443, 537 (1953): "It must prejudice the occasional meritorious application to buried in a flood of worthless ones." Second, there will be substantial disincentive for federal courts to overthrow settled doctrines, no matter how salutary new ones might seem. Although enlightened jurisprudence may call for adopting new policies or correcting errors of interpretation, any court considering such changes must be constantly aware that numerous final convictions will thereupon be placed in jeopardy. The possible, and often undeserved, advantage to a particular litigant is thus obtained at a cost to the entire judicial system.

These examples unfortunately may be multiplied. Admittedly, the Court does attempt to set a minimum threshold for such claims, requiring "a fundamental defect inherently resulting in a complete miscarriage of justice," and "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." (*Ante*, p. 13.) Hopefully this dictum will partially offset the effect of the holding in this case, though if this petitioner's case represents a miscarriage of justice it is hard to imagine one that does not. But one must be concerned that the Court, having taken this giant step so casually, may find the next step equally easy to take, allowing perhaps challenges to evidentiary rulings and other trial matters heretofore considered inappropriate for federal habeas corpus.

VI

The decision in this case cannot reasonably be explained by the maxim "Hard cases make bad law," for although the law made is bad the case is not hard. Whatever reason there might be to strain the contours of § 2255 to permit relief to someone visited with obvious injustice, the fact is that this petitioner has had full opportunity to make his case at every stage of the way. He has alleged no deprivation of his rights to a full and fair hearing at trial, no deprivation of his right to appeal, no inability to get adequate consideration on appellate review. He simply alleges that had his case been appealed at a different time he would have won it. I cannot find that those circumstances are so exceptional as to warrant the result reached today.

I therefore dissent from the Court's opinion. Were I persuaded otherwise, on that score, however, I would nonetheless agree for the reasons stated by MR. JUSTICE POWELL in his dissenting opinion, *ante*, at p. —, that the judgment should be affirmed.